No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NICHOLAS SABO,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the judicial power to determine what types of scientific tests are admissible be delegated by the legislature to an administrative agency and, if so, can a defendant be prohibited from introducing evidence which questions the general reliability of the approved test method?

2. Where a scientific test result has been found admissible by a preponderance of the evidence in a pre-trial hearing, is the mere test result sufficient to constitute the sole proof of an element of an offense if no foundational evidence was submitted to the jury?

3. When offered by a defendant in a criminal case, can speculative evidence constitutionally be barred if it raises a reasonable doubt about a relevant issue?

PARTIES TO THE PROCEEDING

The parties to this matter are Nicholas Sabo and the State of Ohio.

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OPINIONS BELOW

Ohio Supreme Court did not issue a formal opinion. Instead, a summary decision refusing jurisdiction was issued (App., *infra*, 22a). *State v. Sabo*, 2006-0946 08/23/2006 Case Announcements, 2006-Ohio-4288. The Decision of the Court of Appeals for Franklin County, Ohio, (App., *infra*, 4a) has not been officially reported. The web cite is *State v. Sabo*, 2006-Ohio-1521 (March 30, 2006).

JURISDICTION

The Judgment of the Court of Appeals for Franklin County, Ohio, Tenth Appellate District was entered on March 30, 2006. On August 23, 2006, the Ohio Supreme Court denied jurisdiction to appeal. The jurisdiction of this court lies under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

United States Constitution Amendment V

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

United States Constitution Amendment VI

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and * * * to be confronted with the witnesses against him; * * *"

STATEMENT OF THE CASE

The Petitioner was the defendant in a drunk driving case below. What is known as a suppression hearing was held in the trial court, sitting without a jury (Ohio officially mischaracterizes many issues which are in fact *in limine* issues as suppression issues). The foundational evidence dealing with the reliability of the testing machine and testing process was presented to the court at that time. Following the hearing, a written decision was issued in which the breath test result was expressly found admissible using the preponderance of the evidence standard set forth in Ohio case law.

Thereafter, the mere test result was presented to the jury without any foundational testimony regarding the reliability of the testing machine or testing process. The test result was the only evidence offered to the jury on the element of a prohibited concentration of alcohol in the defendant's breath. During opening statement, defense counsel indicated the evidence would show a reasonable doubt as to whether the breath test was accurate. This was the key issue in the case. The prosecution objected on the basis of doctrine set forth in *State v. Vega*, (1984) 12 Ohio St.3d 185, an Ohio Supreme Court case, which in essence prohibits litigation of the general reliability of the breath testing machine once the testing machine has been approved by the Ohio Department of

Health. While the prosecution did not then cite *Vega*, the court later expressly grounded its ruling upon that case (Trial Transcript p. 252 l, 25 — 253 l. 11, App. 39a).

The trial court ruled the defendant's only defense inadmissible. Counsel was instructed not to mention the issue further in opening statement and not to present evidence to this effect. A written proffer (App. 29a) was filed setting forth the defense which would have been presented. The defense was that both the testing machine and the testing process were inadequate to prevent sample contamination due to gastro esophageal reflux disease (hereinafter GERD). In GERD, stomach gasses or alcohol from the stomach contaminates the breath sample which is supposed to consist of only deep lung air.

This defense is factually true and is tacitly admitted to be true by the Ohio Department of Health, the manufacturer of the testing machine, the National Safety Counsel and the prosecution. Despite this, the court ruled that it was speculative and prohibited by *Vega*. The jury was instructed that it had to believe the test was accurate and a verdict was rendered against the defendant.

In short, the reliability of the test result was the key issue in the case below. What scant evidence there was on this issue was submitted only to the court and not to the jury. Furthermore, only the preponderance standard was used. No evidence of reliability was submitted to the jury. The defense was prohibited from offering scientifically valid evidence questioning the reliability of the test. The jury was instructed that it could not question the general reliability of the test. The Court of Appeals affirmed on the basis of *Vega* and the Ohio Supreme Court refused to entertain a discretionary appeal.

The conclusive presumption and reasonable doubt issues were raised in response to the prosecutor's objection on opening statement (e.g. Trial Transcript p.203 l. 14- p. 204 l. 9). The trial court sustained the prosecution's objection on the basis of *State v. Vega*, (1984) 12 Ohio St.3d 18 (Trial Transcript p. 252 l, 25 — 253 l. 11, App. 39a). These issues were also raised in numerous places in the briefs at the Court of Appeals and the Ohio Supreme Court levels. The appellate courts upheld the lower court's decisions.

The confrontation issue was raised orally at trial by the defense when the prosecution sought to introduce the documents containing the breath test result. *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 was specifically raised several times (e.g. Trial Transcript p. 397 l. 24-p. 399 l. 11, App. 44a). It was likewise raised in many places in the briefs in the Franklin County Court of Appeals and the Ohio Supreme Court. All three courts rejected these arguments.

This court's decision in *Holmes v. South Carolina* (May 01, 2006), ___- S.Ct. ___-, 126 S.Ct. 1727, 164 L.Ed.2d 503 was not set forth until the jurisdictional brief submitted to the Ohio Supreme Court. The reason for this is that *Holmes* had not been decided until then. Other cases on the *Holmes* issues were cited in the lower courts.

REASONS FOR GRANTING THE PETITION

A. Ohio law is in radical opposition with the Constitution and numerous cases decided by this court.

For the last 24 years, Ohio has taken the position that the Constitution does not apply to drunk driving cases. This is not defense attorney hyperbole. It is the position

of the chief appellate prosecutor in the busiest court in the state as set forth in its brief below: "The question of what type of evidence may be presented in an OVI case in the State of Ohio is not governed by the Confrontation Clause. Rather it is determined by *Vega*. . .[*supra*]". Brief of Appellee 26.

The state of the law in Ohio is so abysmal that the government in its brief below contended that appellant was asserting a novel concept by maintaining that proof beyond a reasonable doubt should be required in a drunk driving case: "Once again, Appellant is seeking to place a heretofore unknown burden upon the State requiring it to first have evidence found admissible and then requiring proof beyond a reasonable doubt that the evidence is credible." Brief of Appellee, 35.

The assertion that the Constitution does not apply to drunk driving cases in Ohio will once again be proven correct unless this court accepts jurisdiction. Ohio courts have repeatedly demonstrated an unwillingness to change their position and recent changes to federal *habeas corpus* law have made review on the merits in lower federal courts essentially impossible.

Ohio has created an illegal conclusive presumption and barred the defendant from rebutting it. While this alone is a serious constitutional defect, Ohio takes the further radical step of eliminating the need for the prosecution to submit proof of the premise giving rise to the presumption to the trier of fact. The premise, proven only by a preponderance at a motion hearing, is then combined with the unconstitutional presumption to form the sole proof of the central evidence in the case.

The decision of the Ohio Supreme Court in *Vega, supra,* is also in conflict with many decisions of this court, especially *Holmes, supra*, *Francis vs. Franklin*

(1985), 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed 2d 344; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Blakely vs. Washington*, (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

B. Ohio law conflicts with that of other states.

Ohio law is in conflict with decisions from the Supreme Courts of Hawaii and Illinois as well as lower courts in Alaska, Massachusetts, and Minnesota. In *State v. Lowther* (1987), 7 Haw.App. 20, 740 P.2d 1017, the Hawaii Supreme Court declined to follow *Vega*. The court's opinion does a good job of outlining the differences between the Ohio position and that of other states:

> Citing *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), [FN6 omitted] the State contends that the reliability of the Intoxilyzer has been legislatively resolved and is not subject to attack by Defendant. The *Vega* line of reasoning may be summarized as follows:
>
> An accused may not use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath-testing machines, in view of the fact that the General Assembly has legislatively provided for the admission of such tests if analyzed in accordance with methods approved by the Director of Health. *City of Columbus v. Day*, 24 Ohio App.3d 173, 174, 493 N.E.2d 1002, 1003 (1985).
>
> In our view, even if legislation validly provides for the admissibility of Intoxilyzer test results, their admissibility does not automatically equate with the sufficiency of the evidence to establish an unadmitted material fact. See *City of Columbus v. Day, 24 Ohio App.3d 173, 174, 493 N.E.2d 1002, 1003.*

Commentary to Rule 401, Hawaii Rules of Evidence (HRE), HRS Chapter 625 (1985). "[T]he Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact." *State v. Burling*, 224 Neb. 725, 730, 400 N.W.2d 872, 876 (1987). See also *State v. Boehmer*, 1 Haw.App. 44, 613 P.2d 916 (1980). "[I]t is a judicial function to determine whether the evidence, if believed, is sufficient to sustain a conviction." *Burling*, 224 Neb. at 730, 400 N.W.2d at 876. Thus, the test results are not "unassailable." *Keel v. State*, 609 P.2d 555, 557 (Alaska 1980). Moreover, we doubt that the Intoxilyzer's general reliability may be judicially noticed as an adjudicative fact by the trial court. See Rule 201, HRE.

Thus, we side with other courts that have recognized the defendants' right to challenge the general reliability of breath testing devices. For example, an Alaskan court has held:

> Even after the admission of the breathalyzer test results, the burden is still upon the municipality to convince the jury that the breathalyzer test is accurate and that the defendant's blood or breath alcohol was above the prohibited level at the time of driving. Should the defendant have reason to believe that the test results inaccurately reflect his actual blood or breath alcohol concentrations, he can adequately confront the test through the usual tools which he has at his disposal in confronting any witness or evidence. He can rely on the fact that the municipality has the burden of proof, he can rely on cross examination, or he can present evidence on his own.

Cooley v. Municipality of Anchorage, 649 P.2d 251, 255 (Alaska App.1982). Although Cooley

referred to a breathalyzer and not the Intoxilyzer, the above principles are applicable here. See *Commonwealth v. Smythe*, 23 Mass.App.Ct. 348, 502 N.E.2d 162 (1987); *26 *Hounsell v. Commissioner of Public Safety*, 401 N.W.2d 94 (Minn.App.1987); *State v. Burling, supra.*

We find the dissenting opinion in *State v. Vega* [FN7] very persuasive. It states:

> Under the Constitutions of the state of Ohio and the United States all persons accused of crime have the right to present their own evidence including expert testimony. . . . There is no prohibition against the presentation of expert medical testimony by the accused to show the nonexistence of any nexus between the test results and the physical condition of the accused.
>
> * * *
>
> The rule-making power of the Director of Health can never deprive a defendant of his constitutional right to present all relevant evidence in his defense to the crime with which he is charged.
>
> 12 Ohio St.3d at 190, 465 N.E.2d at 1308.
>
> FN7. The Ohio Supreme Court split 4-3 in the *State v. Vega* decision. The majority issued a per curiam opinion. Justice Clifford F. Brown wrote the dissenting opinion.

Lowther, supra, 740 P.2d 1020-1021.

While it does not specifically discuss *Vega, People vs. Bonutti*, 212 Ill.2d 182, 817 N.E.2d 489, 288 Ill.Dec. 131 (Sept. 23, 2004) expressly allowed the GERD defense which was excluded in the case at bar on the basis of *Vega*. In short, there is a clear conflict between the states.

C. Local procedural and evidence peculiarities should not be allowed to serve as a shield to permanently deflect constitutional challenges.

There is a procedural device which has helped this issue evade review for a generation. Without delving too deeply into the intricacies of Ohio law, the practice is as follows: The state charges the defendant with two related types of drunk driving offenses. The defendant can be found guilty of both but only sentenced on one. The state uses the test to gain a conviction on the non-test charge and then elects to sentence on that charge rather than the test charge. It then claims that errors regarding the test are moot since the defendant was not sentenced on the test charge. This device has been fairly effective in allowing blatant unconstitutionality to persist. It is submitted that this technique falls within the "capable of repetition yet evading review" exception to the mootness doctrine. See *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (U.S.Neb. Mar 02, 1982) and *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 USLW 4091, 43 Ed. Law Rep. 857, 1 A.D.D. 333 (U.S.Cal. Jan 20, 1988).

Excluding evidence of innocence is one of the most fundamental violations of due process possible. Because such a violation is, of necessity, couched in evidentiary terms, it has a much greater tendency to be overlooked by courts. Courts tend to apply the abuse of discretion standard to evidentiary matters and are reluctant to reverse on that ground. Appellate courts deciding whether to accept jurisdiction of a matter see that it is couched in evidentiary terms and move on to the next case. Thus, the most fundamental of violations occurs, yet it tends to be overlooked due to the manner in which the issue is framed and because it is thought to be error

correction in an individual case rather than a matter of general importance.

Appellate opinions which base their decision on defendant's failure to introduce some hypothetical evidence that did not exist are much less likely to be reversed than decisions that indicate that evidence of innocence may be excluded. Ohio law requires the exclusion of the most important evidence of innocence in all breath test cases. Thus what happened in the case at bar is not an unfortunate but isolated mistake. It is a typical example of the general rule that results in the routine violation of one of the most basic rights that is supposed to be afforded to criminal defendants. It is also a typical example of the devices which have been used to avoid a decision on the merits on this issue for nearly a quarter of a century.

D. Discussion of questions presented.

1. The judicial power to determine what types of scientific tests are admissible cannot be delegated by the legislature to an administrative agency nor, can a defendant be prohibited from introducing evidence which questions the general reliability of the approved test method

a. Substituting a bureaucratic determination of reliability of evidence for a judicial one deprived the defendant of his right to trial, his right to confront witnesses, and his right to proof beyond a reasonable doubt.

The defendant has a right to a judicial determination of the reliability of the evidence against him. Allowing that decision to be made by a bureaucrat substitutes his

decision for that of a judge or jury. That decision is also untested by the process of cross examination nor is it subject to the proof beyond a reasonable doubt standard. See *Apprendi supra,* and *Blakely, supra.* He has a right to confront his accusers *Crawford, supra.*

The lack of judicial safeguards in Ohio has resulted in the current state of affairs where the bureaucrat who drafted the bulk of the current regulations was fired for testifying falsely. His current counterpart who approves the testing machines now used is a former police officer with no scientific credentials. The jury, however, cannot be told of such facts. They are told that they cannot consider the general reliability of the testing machine.

b. Barring defendants from challenging the bureaucratic determination of reliability creates an unconstitutional mandatory conclusive presumption.

The unusual thing about Ohio is that once the bureaucrat concludes that a particular testing machine is generally reliable, the courts will not allow that determination to be challenged in the criminal case. See *Vega, supra.* This peculiarity results in an unconstitutional mandatory conclusive presumption.

The problems the testing machines have with sample contamination is an issue of general reliability. The machine does not have to be broken to register an inaccurate result (Proffer, App. 29a). By prohibiting general reliability challenges, Ohio essentially bars the most prevalent exculpatory evidence in breath test cases.

In the case at bar, there simply was no evidence presented to the jury that the machine was generally reliable. The test result which establishes the element of a prohibited concentration is only meaningful and admissible if the testing process is generally reliable.

If, as was the case in the instant matter, general reliability is not proven, the question then becomes whether whether or not a presumption can be substituted for proof. The area of presumptions raises one of the most difficult issues known to the criminal law. A good review of the law in this area is found in *Francis vs. Franklin* (1985), 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed 2d 344:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S., at 364, 90 S.Ct., at 1073 . This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, 90 S.Ct., at 1072, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, supra, at 520-524, 99 S.Ct., at 2457-2459; *Patterson v. New York*, 432 U.S. 197, 210, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701, 95 S.Ct. 1881, 1889-1890, 44 L.Ed.2d 508 (1975); see also *Morissette v. United States*, 342 U.S. 246, 274-275, 72 S.Ct. 240, 255, 96 L.Ed 288 (1952).
>
> * * *
>
> The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." *Id.*, at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see *id.*, at 520-

524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see *Ulster County Court v. Allen,* 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [FN2] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. *Patterson v. New York*, *supra*, 432 U.S., at 215, 97 S.Ct., at 2329 ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also *Sandstrom*, supra, 442 U.S., at 520-524, 99 S.Ct., at 2457-2459; *Mullaney v. Wilbur, supra*, 421 U.S., at 698-701, 95 S.Ct., at 1889-1890 .

FN2. A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See *Sandstrom v. Montana*, 442 U.S. 510, 517- 518, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979) .

Id, 471 U.S. 313-314, 105 S. Ct. 1970-1971.

> The jurors "were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." *Ibid.* (emphasis added). . . . the instructions "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster County Court v. Allen, supra*, 442 U.S., at 156, 99 S.Ct., at 2224 (emphasis added).

Id, 471 U.S. 316-317, 105 S. Ct. 1972.

> An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. *A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.* Our cases make clear that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson v. New York*, 432 U.S., at 215, 97 S.Ct., at 2329 .

Id, 471 U.S. 317-318, 105 S. Ct. 1972-1973 (emphasis added).

An example might help illustrate the matter. Under the common law there was a presumption of legitimacy if a child was born during the marriage and if the putative father was not beyond the four seas during the preceding nine months. J. Strong, *McCormick on Evidence*, § 343 p. 442 fn23 (5th ed, Vol. 2, 1999). Once the premise, that the child was born during the marriage and that the parent was not beyond the four seas, was proven, it was mandatory for the jury to believe the conclusion that the child was legitimate. Thus the conclusion had to be accepted even if there was obvious evidence to the contrary. Although couched as a presumption, this was really a public policy decision. The courts understood that there were situations other than being on the high seas that could account for illegitimacy. They simply made a policy decision to ignore evidence to the contrary. At the time there was a strong stigma against illegitimate children and it was felt that the sins of the parents should not be visited upon the children.

This may very well explain Ohio law. Rather than an actual decision based upon science, it may have been decided that convicting people accused of drunk driving is so important and calling witnesses and proving the case such a nuisance, that convictions without proof will be allowed as a matter of policy. The problem is, of course, public policy decisions cannot override the Constitution.

The presumption in Ohio is one level more harsh and more unconstitutional than the presumption of legitimacy. At least in that instance, the premise itself had to be proven to the jury. The jury had to find that the child was born during the marriage and that the father was not "beyond the four seas". If the jury does not believe the premise, it is not required to conclude that the child is legitimate. In drunk driving cases, the unusual thing is

that the premise itself is not even presented to the jury. The judge hears the premise in the suppression hearing and then instructs the jury that conclusion is true.

The trial court clearly felt that the presumption of general reliability of the breath test could not be rebutted by the defendant. In response to a query by counsel the court stated:

> . . .I believe you're perfectly aware that he's [defendant's expert] not allowed to talk about general reliability, the fact that he believes that two tests need to be given in every case, and other such evidence that might put into question the reliability of the test.

(App. 42a, Trial Transcript, p. 268 l. 7-11).

The judge further instructed the jury as follows:

> *The general reliability of breath-testing machines is not an issue in this trial.* However, you, the jury, may consider any evidence presented regarding the defendant's specific test and the specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy.

(App. 44a, Trial Transcript, p. 450 l. 14-18 emphasis added).

If the general reliability of the breath testing machine must be believed by the jury unless rebutted, then there is a mandatory conclusive presumption of general reliability. ~~If the~~ general reliability of the breath testing machine cannot be rebutted, then is an irrebuttable mandatory conclusive presumption. Both are illegal. The jury instruction would be constitutional if, and only if,

the jury was instructed that it may, but is not required to, believe that the breath testing machine is generally reliable.

It is hard to think of a much clearer way of shifting the burden of persuasion than to have the judge tell the jury they must believe an element of the prosecution's case without proof while simultaneously denying the defendant any opportunity to offer proof to the contrary on the issue. Except in the case of affirmative defenses, shifting the burden of persuasion to the defense is always unconstitutional. See *Francis, supra.*

The court apparently felt that because some defenses can be raised in drunk driving cases, this made the presumption rebuttable. The court repeatedly indicated that specific challenges such as a breakdown of the particular machine could be raised. The implication being that this made any presumption rebuttable and therefore constitutional. See, for example, Trial Transcript, p. 268, l. 16-19 (App. 42a).

Attempts to justify mandatory conclusive presumptions by characterizing them as rebuttable betrays an important and fundamental misunderstanding of the nature of mandatory presumptions. There is a widespread view that rebuttable presumptions are constitutional and irrebuttable ones are not. The two terms are actually subspecies of unconstitutional presumptions. While this misconception is in large part due to the misuse of language, it also masks an important constitutional infirmity that goes to the very heart of the due process clause. The need for clarification of this issue is an additional reason that this case should be accepted for review.

While the common misconception is that rebuttable presumptions are constitutional and irrebuttable conclusions are not, the actual distinction is not between

rebuttable and irrebuttable presumptions. Instead, it is between conclusive presumptions and permissive inferences. Even rebuttable presumptions are unconstitutional if they are mandatory. A mandatory presumption tells the jury that if the premise is shown, the conclusion must be accepted. Making a mandatory presumption subject to rebuttal does not mean that it is no longer mandatory, it merely leaves the door open so that the defendant may have the opportunity to reverse the effects of the presumption with other evidence. The problem is that this sort of presumption switches the burden of proof from the state to the defendant. Such a reversal is constitutionally infirm because the Constitution requires that burden to remain at all times on the state.

If, instead, a permissive inference is used where the jury is told that it may, but is not required to accept a certain conclusion this is constitutionally acceptable because the burden of proof remains upon the state. The term "rebuttable" implies that the burden of proof can shift to the defendant. While this is permissible in a civil case, it is forbidden in a criminal case (excepting affirmative defenses). Thus using the term "rebuttable" in an attempt to show that a presumption is constitutional actually shows the reverse. Its use indicates that the burden of proof has been shifted from the prosecution to the defense. This, of course, is what happened in the case at bar.

Another hypothetical example may be of benefit. Suppose there was a murder case where the uncontroverted evidence showed that the killer weighed less than 250 pounds. The defendant's only available defense was that he could not be the killer because he weighed 275 pounds. Unfortunately for him, he was weighed on a scale that was approved for forensic purposes by legislatively authorized state regulation, the regulations

were followed, and that the scale indicated a weight of 240 pounds. The defendant attempts to prove that the dial on the scale has a maximum reading of 240 pounds and that it would be impossible for anyone to weigh more than 250 pounds on this scale.

The court rules that the defendant can show that the regulations were not followed, that the particular scale is broken, or that he was in a different city at the time of the crime; but, he cannot argue that scales of that design are incapable of accurately weighing people heavier than 240 pounds. He cannot challenge the general reliability of the approved scale. The judge instructs the jury that the scale's general reliability and its ability to weigh someone heavier than 240 pounds are not matters for it to consider.

In this example, the general reliability of the scale is being conclusively presumed. The jury is being told that the scale accurately weighs people over 240 pounds and the defendant was barred from challenging that conclusion.

While showing that the individual machine was broken may indeed be a way of showing that the weight was inaccurate, allowing such evidence only lets the defendant challenge specific unreliability of a particular machine. It does not let the defendant challenge the conclusion that the scale is generally reliable. The unconstitutionality lies in the existence of this conclusion which cannot be challenged.

If the jury is required to believe any conclusion that cannot be challenged, any such conclusion is an illegal irrebuttable mandatory conclusive presumption. Following the rationale in the court below, a presumption would only be unconstitutional if the state barred every possible defense that a defendant could offer. The mere

existence of parallel or alternate defenses does not make a conclusive presumption any less mandatory. It merely allows the defendant to prevail in another way despite the illegality of his trial. The presumption is rebuttable if and only if the conclusion itself can be challenged.

Showing that a presumption is rebuttable does not show that it is constitutional, it shows the reverse. If the defendant must rebut it to keep it from being mandatory, then the burden has been unconstitutionally shifted.

If general reliability cannot be challenged, then general reliability is being conclusively presumed. Allowing challenges to specific reliability does not justify barring challenges to general reliability. Allowing the defendant to show that the scale is malfunctioning does not justify barring him from showing that the design of the scale makes it incapable of weighing anyone who weighs over 250 pounds. This is especially true in cases where the scale is not broken and the general defense is the only one available.

Like the scale in the example, the Ohio breath testing machine also has a design defect. It frequently has trouble differentiating alcohol in stomach gasses or alcohol evaporating from the throat and mouth tissue of GERD sufferers from deep lung air. This stray alcohol mixes in with the deep lung breath that the machine is supposed to measure and causes an artificially high test result. The machine does not need to be broken for this error to occur, it is a problem of general reliability. This defect was in the proffer and thus must be assumed to be true for purposes of this case. Keeping this information from the jury is like hiding from the jury the fact that the scale in the hypothetical example could not produce an accurate reading for anyone weighing over 250 pounds.

Even if we assume arguendo that a presumption may substitute for proof beyond a reasonable doubt, there is still another problem. The presumption itself must be true.

> Where a mandatory presumption is used, the defendant may be convicted based upon the presumption alone as the result of the failure of the accused to introduce proof to the contrary. The court reasoned that in such an instance the presumption would be unconstitutional unless the basic facts, standing alone, are sufficient to support the inference of guilt beyond a reasonable doubt.

J. Strong, *McCormick on Evidence*, § 347 p. 470 (5th ed, Vol. 2, 1999).

As was mentioned above, the proffer, indicates both the expert witness and the National Safety Council agree that sample contamination can be a problem. Since the proffer must be accepted as true for these purposes, the presumption of general reliability is not supported by the facts. Therefore it must fail for this reason as well.

2. Where a scientific test result has been found admissible by a preponderance of the evidence in a pre-trial hearing, the mere test result is insufficient to constitute the sole proof of an element of an offense where no foundational evidence was submitted to the jury.

At no time did any finder of fact determine that the breath test used to convict the Petitioner was generally reliable beyond a reasonable doubt. The reliability of the test is the key, if not the only, real issue in most breath test cases. Ohio essentially dispenses with the need for proof beyond a reasonable doubt and bars defendants

from presenting a defense in such cases. This is not some regrettable error in an isolated case. It is standard practice in Ohio.

As was discussed above, *Vega, supra,* creates an irrebuttable mandatory conclusive presumption that the breath test is accurate and reliable. The premise which gives rise to this presumption is regulatory compliance. More egregiously, this premise is not even proven to the jury. Instead the issue is submitted to the court in a pretrial hearing. In that hearing the court uses a preponderance standard. Thus, even if the use of a conclusive presumption is somehow excusable, the burden of proof has also been reduced to a preponderance. Similarly, since evidence of reliability is not presented to the jury, the defendant also does not have the opportunity to cross examine on the issue of reliability or accuracy.

Under Ohio law, the longstanding procedure is that once regulatory compliance has been shown in a motion hearing, the breath test result is admissible. *Defiance v. Kretz* 1991), 60 Ohio St.3d 1, 573 N.E.2d 32. *Athens v. Wolf* (1974), 38 Ohio St.2d 67 O.O.2d 317, 313 N.E.2d 405 held that the standard of proof in a motion hearing is a preponderance. *Vega, supra,* holds that the general reliability of the breath test cannot be challenged.

This court's unanimous decision in *Crawford vs. Washington* (2004), 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229. reversed a lower court as well as *Ohio vs. Roberts* because the lower court's holding:

> ". . .allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutional prescribed method of assessing reliability with a wholly foreign one." *id*, 124 S.Ct. 1370. "Where testimonial statements are at issue, the only

> indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

Id, 124 S.Ct. 1374.

In the case at bar, proof that the testing machine was reliable, was replaced by a "mere judicial determination of reliability" (or a combination of bureaucratic and judicial determinations). The defendant was not given the opportunity to cross examine concerning the accuracy of the test. The jury was instead instructed that the test was accurate. This is not constitutional under *Crawford.*

Recent cases such as *Apprendi v. New Jersey* (2000), 530 U. S. 466, 490 and *Blakely vs. Washington*, (2004) 124 S.Ct. 2531, 159 L.Ed.2d 403, 72 USLW 4546 make it clear that the defendant is entitled to a jury trial on all of the issues in his case. The Ohio procedure denies this right as well. Shifting the burden of proof to a preponderance also contravenes a long list of cases. See, for example, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (U.S.N.Y. Mar 31, 1970).

3. When offered by a defendant in a criminal case, speculative evidence cannot constitutionally be barred if it raises a reasonable doubt about a relevant issue.

Ohio evidence law, as set forth in *Vega, supra,* wrongly deprived the defendant of his constitutional right to present his only meaningful defense in violation of cases such as *Washington vs. Texas* (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. Ohio evidence law does not trump the Constitution. When the two conflict, the Constitution must prevail. *Crawford, supra.*

The defendant was not allowed to discuss a known source of inaccurate readings which is acknowledged by the manufacturer, the Department of Health, the National Safety Council, reputable experts and courts of other states. On the basis of *Vega,* the jury was told that it could not consider whether the breath test was reliable. The defendant was prohibited from presenting truthful evidence that the testing machine is not always reliabile.

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane, supra,* at 690, 106 S.Ct. 2142 (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'

Holmes, supra 126 S.Ct. 1728.

It should be noted that Justice Alito wrote the opinion for a unanimous court. In *Holmes,* the lower court held that strong forensic evidence justified the exclusion of defense evidence which it considered weak. The Supreme Court held that: ". . .where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact. . ." *Holmes, supra,* 126 S.Ct. 1734.

If a court already strongly believes that it is true that the breath test is accurate, any evidence challenging the test seems misleading, speculative, and improper

because it challenges the truth. From that perspective, only evidence strong enough to overcome the court's strong belief will seem proper and therefore admissible. The problem, of course, is that the jury should be weighing the strength of the evidence, not the court.

The trial court cited the speculative evidence rule as a ground in addition to *Vega*. Adding an evidentiary reason for excluding exculpatory evidence of sample contamination due to GERD does nothing to cure the constitutional infirmity. Evidence of bloodshot eyes is routinely admitted but is actually quite speculative because there are a number of possible causes (smoke, dust, chlorine, allergies, fatigue, contact lenses, etc.). Presenting the defendant's use of the medication Zantac as evidence of GERD, on the other hand is not very speculative at all, because, according to the proffer, GERD is virtually the only reason for taking Zantac. The evidence of bloodshot eyes only seems more reliable because it is consistent with what is perceived to be the truth, namely that the test is accurate. The GERD evidence seems questionable because it questions what is perceived to be the truth.

Thus the GERD evidence is falsely perceived as being speculative not due to the nature of the GERD evidence itself, but rather because it questions the court's belief about the accuracy of the test. Excluding defense evidence because the government's forensic case seems strong is precisely what was found to be improper in *Holmes*. In *Holmes*, the court essentially barred defense evidence of third party guilt because it thought the state's case was so strong that it would be misleading or speculative to let the defendant argue someone else committed the crime.

> . . .[T]he State Supreme Court held that "where there is strong evidence of an appellant's guilt,

> especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."361 S.C., at 342-343, 605 S.E.2d, at 24. Applying this standard, the court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence."

Holmes, supra, 126 S.Ct. 1731.

The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, the petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of the petitioner's guilt.

The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have " 'a

> meaningful opportunity to present a complete defense.' " Crane, 476 U.S., at 690, 106 S.Ct. 2142 (quoting Trombetta, 467 U.S., at 485, 104 S.Ct. 2528).

Holmes, supra, 126 S.Ct. 1735.

There are at least three problems with barring defendant's evidence. First, requiring the defendant's evidence to be strong before it can be admitted is unconstitutional. Defense evidence need not be strong to be admitted, it only needs to be sufficient to raise one reasonable doubt in the mind of the jury. Second, when the judge evaluates evidence to see if it is strong enough before it is admitted he is invading the province of the jury. Third, there was no trial evidence regarding the accuracy of the test in this case. Therefore, the probative value of the defendant's evidence was being weighed against preconceived notions as to the accuracy of the test, not against any actual evidence which was produced at trial. How could the defendant's evidence be weaker than no evidence at all?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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Attorney for Petitioner

IN THE FRANKLIN COUNTY MUNICIPAL COURT,
COLUMBUS, OHIO

Case No. 03-190923
Filed September 15, 2004

STATE OF OHIO, CITY OF COLUMBUS,

Plaintiff,

—VS.—

SABO,

Defendant.

SENTENCE ENTRY

Jury trial held, Defendant found guilty of all charges. Court found Defendant guilty of Marked Lanes violation as well.

THE FOLLOWING SENTENCE IS IMPOSED:
FINE:

4511.19(A)(1)

$250 Fine plus court costs. Suspend $ _____ of the fine/ costs for _____.

$50 Fine including costs. Suspend $ _____ of the fine/ costs for _____.

Marked Lanes

IN ACCORDANCE WITH R.C. 2947.14, THE COURT MAKES THE FOLLOWING FINDINGS:

(✔) Per defendant's own state, he is able to pay the fine (and costs) imposed by 12-15-04.

( ) Per defendant's own statement, he/she is able to pay the fine/costs. Time payments authorized.

INCARCERATION:

180 days, Suspend 174 days, credit 3 days for time served. Length of confinement 3 days in _____. Enforcement dated 10-18-04. Balance of sentence is suspended upon the following conditions:

( ) Year(s) **Non-Reporting** probation and Provided No Convictions serious traffic offenses/criminal offenses/ same or similar offenses. Supervised by probation officer as P.N.C. status.

(1) Year(s) **Reporting** Probation.

( ) Other Conditions _____

_____

Conditions of Report and Non-Reporting Probation:

( ) No acts of violence. ( ) DV counseling. ( ) TAPP

(✔) Alcohol/Drug assessment and follow up if necessary.

( ) Stay away from _____.

( ) Community Service _____ Hours.

( ) Restitution to _____ $_____.

( ) Anger Management Counseling. (✔) 3 Day Certified Program.

( ) Case to convert to Non-Reporting probation after C/P complete.

( ) If further counseling needed refer to Judge for hearing date.

( ) Assessment for any & all counseling and follow up if necessary.

(✔) Pay fines and costs.

DRIVING PRIVILEGES SUSPENSION:

Class Type: (5), (4), (3), and (7)

1 year. Beginning dated 8-31-03.

( ) Occupational/Limited driving privileges authorized per separate entry. Effective date _____

(X) Proof of Financial Responsibility provided, clerk to notify Bureau of Motor Vehicles.

( ) Proof of Financial Responsibility not provided, clerk to notify Bureau of Motor Vehicles.

( ) Innocent owner per separate entry. ( ) Vehicle ordered immobilized _____ days per separate entry.

Dismiss -.-.-.-.-.-.-.-.

Further, _____

IT IS SO ORDERED

Appendix 1

9-15-04
DATE

/s/ PAUL M. HERBERT
JUDGE PAUL M. HERBERT

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 04AP-1114
(M.C. No. 2003 TRC 190923)
(REGULAR CALENDAR)

STATE OF OHIO,

Plaintiff-Appellee,

—v.—

NICHOLAS M. SABO,

Defendant-Appellant.

OPINION
Rendered on March 30, 2006

Richard C. Pfeiffer, Jr., City Attorney, *Steven L. McIntosh*, *Lara N. Baker*, and *Matthew A. Kanai*, for appellee.

Cleve M. Johnson, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶ 1} Shortly after 2:00 a.m., on August 31, 2003, Trooper John Johnson of the Ohio State Highway Patrol observed defendant-appellant, Nicholas M. Sabo, driving an automobile northbound on Interstate 71 in Franklin County, Ohio. The trooper witnessed defendant traveling 65 m.p.h. (which is within the posted speed limit) approximately five feet behind another vehicle. He also observed defendant weave in his lane of travel over the white edge line several times, each time by a distance of two tire widths. The trooper followed defendant for about a mile and then pulled him over. Defendant rolled down his window as the trooper approached his car. The trooper immediately detected a strong odor of alcohol about defendant; he also noted that defendant's eyes were bloodshot and glassy.

{¶ 2} Thereafter, the trooper requested that defendant exit his vehicle and be seated in the patrol car. Defendant spontaneously stated that he "could [not] afford a DUI" because he was in the process of obtaining employment with a law enforcement agency. (Tr. Vol. II, at 296.) Inside the patrol car, the trooper once again detected a strong odor of alcohol about defendant and saw that his eyes were bloodshot and glassy; he also noted that defendant's speech was slightly slurred. Upon questioning, defendant admitted that he had been drinking. Thereafter, the trooper administered two field sobriety tests, which defendant failed.

{¶ 3} Defendant was subsequently arrested and transported to a police station, where he agreed to submit to a BAC DataMaster test. The test yielded a result of .117 grams of alcohol per 210 liters of breath. Defendant was

charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1), operating a motor vehicle with a prohibited alcohol concentration in violation of R.C. 4511.19(A)(3), and failing to drive within marked lanes in violation of R.C. 4511.33.

{¶ 4} Defendant filed a motion to suppress evidence obtained from sobriety or other tests performed to determine defendant's alcohol level, including the BAC DataMaster test result of .117 and the trooper's observations or opinions regarding defendant's sobriety or alcohol levels. Following a hearing, the trial court, in a written decision filed April 7, 2004, overruled defendant's motion to suppress.

{¶ 5} The case proceeded to a jury trial in the Franklin County Municipal Court. The state presented the above cited testimony of Trooper Johnson. Defendant presented the testimony of Scott Kotterman, a police officer friend of defendant, who picked defendant up from the police station after he was released from custody. According to Mr. Kotterman, when defendant emerged from the police station, he did not appear to be under the influence of alcohol. Mr. Kotterman admitted, however, that he did not know how much defendant had to drink prior to his arrest.

{¶ 6} At the conclusion of the evidence and the end of deliberations, the jury found defendant guilty on the R.C. 4511.19(A)(1) and (A)(3) charges and the court found defendant guilty on the R.C. 4511.33 charge. At the sentencing hearing, the state elected to sentence defendant on the R.C. 4511.19(A)(1) charge rather than the R.C. 4511.19(A)(3) charge. Pursuant to a "Sentence Entry" filed September 15, 2004, the trial court sentenced defendant for violating R.C. 4511.19(A)(1) and

4511.33; no sentence was imposed on the R.C. 4511.19(A)(3) charge. Defendant was sentenced to 180 days in jail and fined $250 on the R.C. 4511.19(A)(1) charge and $50 on the R.C. 4511.33 charge. His operator's license was suspended for one year from the date of the offense. The trial court credited three days for time served and suspended 174 days of defendant's jail sentence on condition of one year probation.

{¶ 7} On appeal, defendant advances the following eight assignments of error:

> I. It was error to interpret [*State v. Vega*] in a manner that required the court to misinform to the jury about the accuracy of the breath test and that prohibited the defendant from telling the truth.
>
> II. Absent a *Vega* rationale, there was no other legitimate basis for barrning [sic] the defendant from exercising his constitutional right to litigate the only real issue in the case.
>
> III. It was error to deprive the defendant of due process of the law and his only significant defense by instructing the jury that it must believe false information about the accuracy of the breath test while simultaneously prohibiting the defendant from presenting the truth.
>
> IV. The defendant was deprived of his right to have the state prove its case and his right to confront witnesses against him when the jury was directed to believe the test even though there was no evidence that his test result was accurate.
>
> V. Neither bureaucratic fiat nor legislative edict regarding the accuracy of the test can constitution-

ally deprive a defendant of his right to a judicial determination as to the weight of the evidence.

VI. The rules of evidence do not trump the Constitution. By prohibiting the defendant from asserting his innocence and presenting his only significant defense, the court deprived the defendant of his right to a trial by jury.

VII. Because there was no proof that the testing machine was accurate, either an unconstitutional conclusive presumption substituted for proof or there was a failure of proof.

VIII. Because the facts giving rise to the presumption where [sic] presented only in a suppression hearing and established only by only a preponderance of the evidence, the resulting trial presumption that the test was accurate did not meet the beyond a reasonable doubt standard.

{¶ 8} As defendant's assignments of error are interrelated, we will address them together. Defendant contends the trial court erred in refusing to admit expert testimony at trial as to how the BAC DataMaster test results could be adversely affected if a person has gastroesophageal reflux disease ("GERD").

{¶ 9} During opening statement, defense counsel, in discussing the Ohio Department of Health ("ODH") regulation mandating the analysis of deep lung (alveolar) air for purposes of determining whether a person has a prohibited breath alcohol concentration (see Ohio Adm.Code 3701-53-02), asserted that alcohol fumes brought up from the stomach into the mouth of a person suffering from GERD could contaminate deep lung air, causing an inaccurate reading of the person's actual breath alcohol by the BAC DataMaster. The prosecutor

objected to further discussion of this issue on grounds that, absent evidence presented at trial that defendant actually had GERD, the issue was irrelevant.

{¶ 10} In response, defense counsel averred that the issue was relevant to his defense theory that existing ODH testing procedures requiring administration of only one breath alcohol test are insufficient to ensure that only deep lung air is sampled. Defense counsel asserted that, in support of this theory, he planned to call an expert witness who would testify that "the basic [ODH] testing procedure is flawed" because "in every case you should do two tests" and that "scientifically, if you don't give two tests, you're not doing a good job of determining whether that air is alveolar air or whether it's air coming from somewhere else, and the procedure was flawed." (Tr. Vol. I, at 205, 206-207.) Defense counsel further asserted that the expert would testify that a person who regularly takes Tums or Zantac is likely to suffer from GERD, that the use of dip (chewing tobacco) causes or exacerbates the condition, and that GERD could be ruled out as a possible source of adverse test results through standardized administration of two breath alcohol tests followed by a comparison of the results. Defense counsel further stated that he planned to call a fact witness to testify that defendant regularly uses dip and takes Zantac and Tums.

{¶ 11} The trial court first noted that defense counsel had not raised the GERD issue at the hearing on the motion to suppress. The court further noted the distinction between run of the mill acid indigestion and the medically diagnosed condition known as GERD. To that end, the court ruled that defendant's expert would not be permitted to express an opinion as to whether or not defendant had GERD. In response, defense counsel indi-

cated that the expert would not testify specifically about defendant; rather, the expert would testify only "in the abstract" as to the relationship of Tums, Zantac, and dip to GERD and the possible effects of GERD on breath alcohol tests. (Tr. Vol. I, at 209.)

{¶ 12} The prosecution argued that the proposed testimony presented both an improper challenge to defendant's specific test results (because there would be no direct evidence that defendant suffered from GERD or used dip, Zantac, and Tums), as well as an improper challenge to the general reliability of the BAC DataMaster. Defense counsel maintained that he did not intend to argue that the BAC DataMaster machine itself was unreliable; rather, he intended to argue only that ODH testing procedures requiring only one breath alcohol test are inadequate to rule out the possibility of GERD. Defense counsel argued that the proposed testimony went to the weight rather than the admissibility of defendant's breath alcohol test and, therefore, should be admitted at trial. As such, argued defense counsel, GERD was a proper subject for opening statement.

{¶ 13} With the court's permission, defendant filed a written proffer indicating that, if permitted, he would have presented the following evidence. Dr. Alfred E. Staubus, Professor Emeritus of Pharmacology at The Ohio State University, would state that he was very familiar with the BAC DataMaster used in the instant case. He would hypothesize that, if he were testing a person's breath alcohol level and knew that the person regularly used Zantac, Tums, and dip, he would be suspicious that the person had GERD because dip can cause or exacerbate the condition, and Tums and Zantac are commonly used to treat the symptoms associated with GERD. Dr. Staubus would acknowledge that Tums can

be used to prevent osteoporosis; however, he would state that there is normally no reason to take Zantac other than to treat GERD. Dr. Staubus would further state that a person could have GERD or a GERD episode without knowing it, as oftentimes the condition is not manifested through pain or other unusual physical sensations. He would further aver that alcohol fumes brought up from the stomach into the mouth of a person with GERD could contaminate the deep lung air sampled during a breath alcohol test, causing an inaccurate reading of the person's actual breath alcohol level. He would further opine that it would not be necessary to see someone belch or burp during a test to trigger a concern about the test result.

{¶ 14} Dr. Staubus would opine that the best way to protect against this type of false reading is to administer two tests, separated by a waiting period, followed by a comparison of the test results. Dr. Staubus would aver that this dual testing procedure was adopted in 1986 by the National Safety Counsel's Committee On Alcohol and Other Drugs Subcommittee on Technology.[1] He would further opine that failure to adopt the dual testing approach virtually "guarantees that a significant percentage of the people tested in this state will generate false readings," as GERD is a common condition. (Proffer, at 5.) Accordingly, he concluded that performing only a single test is scientifically unacceptable in every case.

{¶ 15} Further, Mr. Kotterman would testify that he had been defendant's roommate for some time and often observed defendant taking Tums and Zantac and using dip.

---

[1] A copy of the report adopting the dual testing procedure is attached to the written proffer and is incorporated by reference therein.

{¶ 16} After reviewing the proffer, the trial court precluded the proposed testimony based on the Ohio Supreme Court's holding in *State v. Vega* (1984), 12 Ohio St.3d 185, discussed below. More particularly, the trial court excluded defendant's challenge to his specific test based on a lack of evidentiary support for that challenge while separately excluding the challenge to the general reliability of the testing procedure. The trial court noted initially:

> There are many different ways of attacking * * * the defendant's specific test. But the proffered testimony of defense counsel in this case seems clear to me that defense counsel intends on attacking the general reliability of the test and not the specific test result in this case because he can't produce any evidence * * * that goes to this specific event and this specific test.
>
> There's some nebulous thoughts about a possible acid reflux reaction that the defendant may have had that might have caused this specific test to be unreliable; however, the defense's argument is so tenuous that I believe I would be going against Ohio law to permit any discussions of any nature with regard to the lines of argument that defense counsel has thus presented. And, therefore, for those reasons, I'm again going to sustain the objection by the prosecutor and I'm not going to allow your expert to challenge the reliability of the breath-testing machine.

(Tr. Vol. I, at 226.)

{¶ 17} In its final ruling on the issue, the trial court further distinguished between specific and general challenges to the breath alcohol test:

> * * * [A]m I going to allow you to make any comments to the jury with regard to this specific test? The answer to that question is no. * * * [Y]ou've proffered, I think, a great deal of information to me about—and I've asked you questions about what you would intend the evidence to show in this case, and there is not any testimony that's going to come forward that would be relevant to the specific test. So I am not going to allow you to make any comment with regard to this specific test result nor would I allow your expert to testify with regard to the reliability, general reliability of these machines. * * *

(Tr. Vol. I, at 230.)

{¶ 18} R.C. 4511.19 is a strict liability statute. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3, citing *State v. Cleary* (1986), 22 Ohio St.3d 198, 199. In R.C. 4511.19(A)(3), the General Assembly defined an alcohol limit at which a person can no longer drive without posing a substantial danger to himself and others. *State v. Tanner* (1984), 15 Ohio St.3d 1, 6. When determining whether a defendant committed the "per se" offense set forth in R.C. 4511.19(A)(3), the trier of fact is not required to find that the defendant operated a motor vehicle while under the influence of alcohol or drugs; rather, the trier of fact must find only that the defendant's chemical test reading was at the proscribed level and that the defendant operated a motor vehicle within the state. *Kretz,* supra, citing *Newark v. Lucas* (1988), 40 Ohio St.3d 100, 103. As such, the accuracy of the test results is a critical issue in determining a defendant's guilt or innocence. *Kretz,* supra.

{¶ 19} The admissibility in evidence of test results offered to establish a defendant's level of alcohol concentration under R.C. 4511.19 turns on substantial com-

pliance with ODH regulations. Id. The General Assembly has determined that results of breath alcohol tests are reliable evidence when administered in accordance with ODH regulations. *Vega,* supra, at 188. Accordingly, the Ohio Supreme Court has determined that, while a defendant may not use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath testing machines, a defendant may attack the reliability of the specific testing procedure and may submit expert testimony as to testing procedures going to weight rather than admissibility. Id. at 189. See, also, *Tanner,* supra ("[a] defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels"), and *Whitehall v. Weese* (Oct. 17, 1995), Franklin App. No. 95APC02-169 ("while a defendant 'may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood-alcohol levels, he may challenge the accuracy of his specific test result.' " Id., quoting *Columbus v. Day* (1985), 24 Ohio App.3d 173, 174.

{¶ 20} Defendant contends the trial court misconstrued his argument as presenting a challenge only to the general reliability of the legislatively determined testing procedure. Defendant maintains that his proffered testimony presents a challenge to the reliability of his specific testing procedure, i.e., "the machine was unreliable in the narrow and specific instance where a single test was given to a person potentially suffering from GERD." Defendant argues that "a problem testing GERD victims is not the same thing as saying that the machine is generally unreliable" and that such a challenge is proper under *Vega.*

{¶ 21} As previously noted, the trial court indicated that it excluded defendant's challenge to the accuracy of his specific test results based on a lack of evidentiary support while separately excluding the challenge to the general accuracy of the testing procedure. We cannot find that the trial court erred in this regard.

{¶ 22} As noted by the state, the difficulty in this case is that defense counsel attempted to challenge defendant's specific test result through argument and proffered testimony, which, in essence, challenged the general reliability of the testing procedure. Argument and testimony that, on the night in question, defendant experienced an episode of GERD and that the presence of regurgitated alcohol could have interfered with his test result might have presented a challenge to the reliability of defendant's specific test results. However, defense counsel at no point indicated that testimony would be offered at trial to establish that defendant experienced an episode of GERD at the time he took the breath alcohol test or that he even had the condition. Indeed, defense counsel admitted that Dr. Staubus would testify only "in the abstract" about the possible effects of GERD on breath alcohol tests and that neither defendant nor a medical professional would testify that defendant had GERD. Thus, to the extent defense counsel's argument and the proffered testimony could be viewed as presenting a challenge to the reliability of defendant's specific test results, we find that the trial court properly excluded the testimony based on a lack of evidentiary support.

{¶ 23} In essence, argument and testimony that the "basic testing procedure" is flawed in "every case" and that a single test is never scientifically reliable is an attack on the general reliability of the testing procedure,

not an attack on a specific test. The trial court properly concluded that such a challenge is precluded *by Vega*.

{¶ 24} Defendant asserts that a decision in favor of the state on this issue poses a potential conflict with a recent case decided by the Sixth District Court of Appeals, *State v. Durnwald,* 163 Ohio App.3d 361, 2005-Ohio-4867. We disagree.

{¶ 25} In *Durnwald,* the defendant was arrested after committing several traffic violations and failing two sobriety tests. Defendant submitted to a BAC Data-Master test, the results of which established a breath alcohol content of .22. The defendant was subsequently charged with operating a vehicle under the influence of alcohol and operating a motor vehicle with a prohibited alcohol concentration.

{¶ 26} At trial, the defendant offered testimony from persons with whom he socialized prior to his stop and arrest, that he consumed five light beers in the five hours prior to his stop and arrest, and did not appear to be under the influence of alcohol at any time prior to the arrest. Defendant corroborated the five beers in five hours testimony and further testified that he had snuff (chewing tobacco) in his lip at the time of the stop. He further testified that he suffered from and took prescription medication for acid reflux, that the acid reflux condition flared up when he was nervous, causing him to burp and hiccup, that he was nervous while talking to the arresting officer, and that at the time he took the BAC test he burped and hiccupped.

{¶ 27} During trial, the defendant sought to introduce expert testimony from Dr. Staubus to describe the actions and level of impairment exhibited by a person with a .22 BAC test level compared to the defendant's

behavior and to testify about how the BAC test results could be affected if a person has GERD. The trial court denied admission of the expert testimony as to the impairment comparison, but permitted limited testimony as to the effects of GERD. The defendant then proffered in an affidavit as to Dr. Staubus's proposed testimony.

{¶ 28} In *Durnwald*, Dr. Staubus ultimately testified that, hypothetically, a person of the defendant's height and weight should have tested in a range of equal to or less than .02. He opined that, for a person of the defendant's height and weight to test at .22 under the facts presented, that person would have had to consume considerably more than five light beers. Dr. Staubus further testified that persons who suffer from GERD have excess burping which, if occurring at the time of taking the breath alcohol test, could cause an inaccurate reading of the person's actual breath alcohol by the Data-Master machine.

{¶ 29} On appeal, defendant argued that the trial court improperly limited Dr. Staubus's testimony as to the impairment comparison. The state did not cross-appeal the admission of the GERD testimony; as such, the court of appeals had no occasion to address the propriety of that admission. The court merely noted, incidentally, that "Dr. Staubus's testimony was ultimately permitted regarding the effects of GERD on the BAC tests results because the court deemed it pertinent to the per se charge." *Durnwald*, at ¶ 50.

{¶ 30} Further, the instant case is factually distinguishable from *Durnwald*. As noted, the defendant in *Durnwald* testified that he suffered from and took prescription medication for GERD. He also testified that the condition flared up when he was nervous, which caused him to hiccup and burp, and that he was nervous and hic-

cupped and burped when he was taking the test. In contrast, defendant provided no evidence in the instant case that he actually suffered from GERD, other than that he took non-prescription Zantac, or that he burped or hiccupped or was otherwise suffering from GERD at the time he took the DataMaster test. Because the factual foundation underlying the admission of Dr. Staubus's testimony in *Durnwald* was considerably more substantial than the speculative foundation of the instant case, we find that the two cases are clearly distinguishable.

{¶ 31} Finally, we note that the *Durnwald* case stands for a different proposition than that asserted in the instant case. In *Durnwald,* the court noted that "Dr. Staubus was not, however, permitted to testify regarding the *expected behavior* of someone who tested at 0.22 BAC level, *for the purposes of refuting the R.C. 4511.19(A)(1) impairment charge.*" (Emphasis added.) Id. In the instant case, defendant did not argue that Dr. Staubus's testimony should be admitted for the purpose of refuting the R.C. 4511.19(A)(1) impairment charge. Rather, defendant sought to introduce Dr. Staubus's testimony for the sole purpose of refuting the R.C. 4511.19(A)(3) charge. Indeed, on appeal, defendant does not address or present any argument regarding his conviction under R.C. 4511.19(A)(1). Thus, *Durnwald* is inapposite.

{¶ 32} We now turn to defendant's remaining arguments. Defendant first contends that *Vega is* inapplicable to the instant case because: (1) the statute construed in *Vega* established a rebuttable presumption and the statute establishes a "per se" offense; (2) the scientific conclusions upon which *Vega* was based were offered by an ODH expert who was subsequently fired for giving

false testimony; and (3) the breath testing device used in *Vega is* different from the one used in the instant case. Defendant next contends that *Vega is* "confusing" and urges this court to "clarify" it. Finally, defendant asserts that the trial court's application of *Vega* violated several constitutional principles, including the right to due process, the right to confront one's accusers, the right to a jury determination of guilt, the right to present a complete defense, and the prohibition against conclusive presumptions in criminal cases.

{¶ 33} We note, initially, that defendant failed to raise any of these arguments in the trial court, resulting in a waiver of all but plain error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists only where there is a deviation from a legal rule, the error constitutes an "obvious" defect in the trial proceeding, and the error affected the defendant's "substantial rights." *Barnes,* at 27. Crim.R. 52(B) does not require an appellate court to correct a forfeited error, even if it satisfies all three of these prongs, as the rule states only that a reviewing court "may" notice plain errors. Id. Accordingly, plain error is recognized " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 34} We decline to find plain error in this case. Defendant's arguments regarding the inapplicability of *Vega* are without merit. In *Tanner,* supra, the Ohio Supreme Court applied *Vega* to the then recently enacted "per se" statute. The qualifications of a former ODH director and the ODH's decision to change breath testing

machines are irrelevant to the instant case. Further, we decline defendant's invitation to "clarify" *Vega*. As we have previously noted, "this court is charged with accepting and enforcing the law promulgated by the Ohio Supreme Court, not changing, modifying or ignoring that law." *State v. Miskel* (Mar. 28, 2000), Franklin App. No. 99AP-482, quoting *Columbus v. Duling* (Mar. 31, 1997), Franklin App. No. 96APC07-859. Finally, this court has previously rejected defendant's constitutional challenges. In *State v. Eberts* (Sept. 26, 2000), Franklin App. No. 99AP-1327, we stated:

> * * * [I]n *Columbus v. Duling* * * *, we declined to embrace a defendant's argument that the trial court violated his constitutional rights when it precluded him from attacking the general reliability of a breath test machine. In so declining, we indicated that "[a]ny change in the law regarding a defendant's right to challenge the general scientific reliability of a breath testing device must come from the Ohio Supreme Court, not this court."

See, also, *Miskel*, supra.

{¶35} For the foregoing reasons, we overrule all eight of defendant's assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 04AP-1114
(M.C. No. 2003 TRC 190923)
Filed March 30, 2006
(REGULAR CALENDAR)

STATE OF OHIO,

Plaintiff-Appellee,

—v.—

NICHOLAS M. SABO,

Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 30, 2006, defendant's eight assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs are assessed against defendant.

BROWN, BRYANT & FRENCH, JJ.

/s/ SUSAN BROWN
Judge Susan Brown

THE SUPREME COURT OF OHIO

Case No. 06-946
Filed August 23, 2006

STATE OF OHIO

v.

NICHOLAS M. SABO

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 04AP1114)

/s/ THOMAS J. MOYER

THOMAS J. MOYER
Chief Justice

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

Case No. 2003 TRC 190923
Filed April 7, 2004
Judge Herbert

STATE OF OHIO,

Plaintiff,

—v.—

NICHOLAS M. SABO,

Defendant.

DECISION

The defendant properly filed his motions to suppress evidence on September 11, 2003 and on September 17, 2003. A hearing was held on February 3, 2004 on the merits of the motions filed. The state bears the burden of proof including the burden of going forward. The burden of proof on a motion to suppress evidence is by a preponderance of the evidence.

The defendant set forth four separate arguments for the suppression of the state's evidence. The defendant first asserts that he had chewing gum in his mouth at the time of the breath test in violation of Ohio Adm. Code Sec. 3701-53-02 and well established case law.

The arresting officer, Trooper Johnson, indicated that the defendant was continually in his presence from the time of arrest until the administration of the breath test. A period longer than twenty (20) minutes. Trooper Johnson testified the defendant did not place anything in his mouth, nor could he have had access to any object and did not notice anything in defendant's mouth. Additionally, the Trooper had an opportunity to talk with the defendant and observe him in the front seat of the cruiser. It might have been possible for defendant to serptitiously secret chewing gum in a far reaching oral cavity for the sole purpose of causing a violation of Ohio Adm. Code Sec. 3701-53-02 and thus a suppression, however, this is not probable. The defendant was readily discussing and seemed wholly concerned about what affect this incident might have upon his possible future employment as a law enforcement officer. The court did not note any nefarious attempt by the defendant to conceal chewing gum. The evidence instead pointed to an affable and cooperative subject who was willing to comply with the requests of law enforcement. There was also no negligence on the part of law enforcement in that they overlooked to investigate this critical requirement of the law.

The defendant called a credible witness who directly contradicted the state's position regarding this issue. Defendant's witness testified that the chewing gum was the first thing he noticed when he picked up his friend at the police station. The witness also indicated the defendant said that the chewing gum was in defendant's mouth during the entire time.

The court finds that the state has met its burden by a preponderance of the evidence that the state substantially complied with Ohio Adm. Code Sec. 3701-53-02.

The defendant next asserts that rubber stamps are not sufficient to properly credential an officer to administer breath tests in Ohio. The court does not agree. The officers testified that they took the proper course work and passed the same by the Ohio Department of Health. They testified they received qualification as senior operators and that these credentials were in effect on the day they performed the test that is the subject of the instant motion.

The court believes the witnesses testimony alone is sufficient to meet the state's burden that they are qualified to administer the tests that were performed on the day in question. The court additionally agrees with the state's position regarding the admission of the certificates. The officers are qualified to testify that they received those certificates and what those certificates represent. The defendant's objection to the exclusion of the certificates is hereby overruled.

The defendant thirdly urges the court to suppress the results of the breath test in the instant case due to the fact that Ohio Adm. Code Sec. 3701-53-09(C) was amended to require an annual renewal of senior operator's licenses. The previous period was two years. The issue is what effect the change in the permit's length would be on otherwise valid senior operator's permits.

The issue was exhaustively and previously considered by this court in *State of Ohio v. Timothy Bechtel, Case No. 2003 TRC 192513*. The *Bechtel* decision is directly on point even sharing the same senior operator's license of the same trooper, Trooper Bee. Judge Schneider, in his well reasoned decision, cited authority in determining that if a statue or regulation is to be applied retroactively it must first pass a two-part test. First, whether the law specifically states that it should apply retroactively and if so, secondly, whether the regulation takes away or

impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

Ohio Adm. Code Sec. 3701-53-09(C) states,

> Permits issued under paragraph (A) and (B) of this rule shall expire one year from the date issued, unless revoked prior to the expiration date. An individual holding a permit may seek renewal of an issue permit by the director. . . by filing an application. . . The director shall not renew the permit if the permit holder is in proceedings for revocation. . .

There is no language or express intent in this regulation to apply the one year expiration date retroactively. Therefore, absent a clear indication that this regulation should apply retroactively, permits with a two year expiration date are valid through the indicated date on the certificate. All permits issued after the enactment of this regulation will be valid for only one year. Because the regulation does not state that the amendments should apply retroactively, there is no need to go on to the second part of the test.

Defendant's final argument for the suppression of the evidence appears to be that the checklists used during the breath test are improper due to the fact they are not set forth specifically in OAC sec. 3701-53-02.

Section 3701-53-02(C) reads:

> (C) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the

> instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

Defendant asserts that due to the fact that the forms could be now changed at the whim of a health department employee, that important procedures could be left out for testing such as the requirement of observing the defendant for twenty (20) minutes prior to testing.

Although defendant's argument may have some validity, the court finds that forms are useful to insure compliance with legal requirements, however are no substitute for actual compliance or substantial compliance. In other words, if on the operational checklist the box was checked that the subject was observed for twenty (20) minutes prior to testing, yet testimony was elicited that the subject had been observed for only ten (10) minutes, it is obvious the test must be suppressed. However, if the officer neglected to check the first box on the checklist yet credibly testified he observed the subject for longer than twenty (20) minutes, although this would amount to a serious question, it might not necessitate the suppression of the test.

Nevertheless, this court finds that the Trooper's testimony regarding the procedures used during the instant breath test to be in substantial compliance with the law and requirements of Ohio. Furthermore, the court finds the checklist to be relevant to this hearing and its probative value outweighs any prejudicial value. Therefore, it shall be admitted for the purpose of this hearing.

Defendant did not mention in his written briefs any objection to the probable cause for the stop of the vehicle. Nevertheless, there was testimony and discussion

regarding this issue. The court finds that the defendant was following too close to another vehicle as well as the cited offense of a lane violation which gives ample reason to warrant the institution of a traffic stop.

Based upon the foregoing, defendant's motion to suppress is hereby overruled.

/s/ PAUL M. HERBERT
Judge Paul M. Herbert

NOTICE DATED: April 6, 2004

COPIES TO:

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IN THE MUNICIPAL COURT FOR
FRANKLIN COUNTY, OHIO,
CRIMINAL DIVISION

Case no.: 2003 TR C 190923
JUDGE HERBERT

STATE OF OHIO

Plaintiff

—vs.—

NICHOLAS M. SABO

Defendant

PROFFER

Now comes the defendant and hereby proffers the following testimony:

Had this case proceeded, the defendant would have adduced the following testimony and would also have referred to such anticipated testimony in his opening statement:

The defendant would called Dr. Alfred E. Staubus as an expert witness. Dr. Staubus has a doctorate in pharmacy and is a Professor Emeritus of Pharmacology at the Ohio State University and has testified many times as an expert in both civil and criminal cases for both the plaintiff and the defense. Testimony would have been adduced

qualifying Dr. Staubus as an expert in pharmacology, anatomy, physiology, and alcohol and drug testing. He would have vouched for the credentials attached to and incorporated into this stipulation.

All of the matters testified to by Dr. Staubus would be based upon reliable scientific, technical, or other specialized information and be true to a reasonable degree of scientific certainty. Dr. Staubus would testify that he is very familiar with the breath testing device used in this case, that he has used them for years, and in fact currently owns and uses these machines. He believes that such machines work and are accurate from a scientific prospective if they are used properly. Likewise, Dr. Staubus would testify that he is well acquainted with the information contained in the attached articles and he would testify to all of the matters set forth therein. Said articles are also hereby incorporated by reference into this proffer.

Q As a scientist, if you were testing the breath of a subject for alcohol and you knew that the subject regularly used Zantac, Tums, and used dip, would that have any significance to you?

A If someone took these things, I would be very suspicious that the person had gastroesophageal reflux disease [hereinafter GERD]. Zantac and Tums are commonly taken for this and dip can cause or exacerbate this. In fact, Zantac is used primarily for this purpose. Zantac is not a drug of abuse and there is normally no other reason to take such medication other than to treat GERD. While Tums can be taken for osteoporosis, Zantac is not helpful for osteoporosis.

Q What is dip.

A Dip is tobacco that is taken orally. The saliva from the mouth will combine with the tobacco that will be swallowed and act as an irritant to the gastrointestinal system. It can both cause and exacerbate GERD.

Q What is GERD?

A GERD results from a defect in the valve between stomach and esophagus. It causes stomach gases and fluid to escape from the stomach and travel all or part of the way up into the throat or mouth. The stomach acids then irritate the non stomach tissue which is not constructed so as to be resistant to such acids.

Q Is there a common name for this?

A Heartburn, nervous stomach.

Q Does someone with GERD always know that they have the condition generally.

A No. Sometimes there is no pain involved with this condition. It can present as a cough or as trouble speaking without the common heartburn type symptoms.

Q Does someone who knows generally that they have GERD always know when they are having a GERD episode.

A No. As I said, sometimes there is no pain or other sensation.

Q Could a doctor be sitting next to the person and not know that a GERD episode was occurring.

A Yes. This diagnosis is normally made by using a scope to look at the person's esophageal track. Normally scarring or damage to the tissue is what is looked for. If the scope is not inside the esophagus at the time that the reflux is occurring, it could quite

easily be undetectable even to a physician directly observing the subject with GERD.

Q Could someone with GERD have a strong odor of alcohol about them?

A Yes. If there was alcohol in the stomach being forced up the esophagus, the smell from this alcohol evaporating from the throat tissues would combine with the air from the alcohol in the lungs and result in a stronger odor than if it were coming from the lungs alone. If you have ever been around someone who has vomited recently, you know that you get a distinct odor from that. Reflux is similar to that. If alcohol was in the stomach there would be an alcohol smell.

Q What does GERD have to do with breath testing?

A. It can cause false readings. The breath test is only accurate if the sample is taken from deep lung or alveolar air. GERD causes the deep lung air to be contaminated by alcohol suspended in air in stomach gas and alcohol evaporating off of throat and mouth tissues.

Q This sounds like such a small amount of alcohol, is this really significant?

A Yes. keep in mind that we are measuring alcohol suspended in air to begin with. The amounts involved are small to begin with, so a small contamination can have a very significant effect.

Q Scientifically, would it be good practice to inquire whether someone takes these types of medications.

A Yes

Q Is there a mechanism in the machine which is supposed to detect and prevent such false readings?

A Yes

Q Are you familiar with the Ohio Department of Health rules and regulations?

A Yes

Q Is there a rule regarding deep lung or alveolar air?

A Yes

Q Are you familiar with the ODH operator's checklist for the operation of the Datamaster?

A Yes

Q Is there a provision regarding a 20 minute waiting period before testing?

A Yes

Q Are you familiar with a memorandum sent by the Ohio Department of Health testing stations regarding waiting 20 minutes following an invalid sample reading during a test?

A Yes

Q Why is this waiting period necessary?

A If alcohol where to get into the subject's throat or mouth within 20 minutes before the test. This could cause a false test reading.

Q But didn't you just tell us that there is a mechanism in the machine which is supposed to prevent this. Why would a waiting period be necessary if the machine has this built in protection?

A The plain truth is that this mechanism is not perfect. Sometimes the machine can tell if air is coming from

deep in the lung and sometimes it cannot. Both the Ohio Department of Health and the manufacturer admit this and that is the reason for the rule.

Q Have you personally witnessed this sort of false reading happening?

A Yes.

Q Now when you were doing this, would you have known that this test had a false reading if you had not done more than one test?

A No.

Q So would an officer in the field dong a single test know he was getting a false reading?

A No. In a single test, the machine would do nothing to make the officer suspicious.

Q Does it make any difference if the alcohol comes from the mouth down or the stomach up?

A It can affect the test either way.

Q Is there anything that can be done to protect against this sort of false reading?

A Yes, there is a very simple technique. You simply do more than one test with a waiting period in between. You then compare results. If there is a significant difference between the results, you know that there was a false reading. Deep lung air is more stable than stomach gas and alcohol evaporating from throat and mouth tissues. Because of this the degree of contamination is more likely to vary. If it does, this variance can be detected by comparing the test results.

Q Have any scientific organizations looked at this issue?

A Yes, the National Safety Counsel's Committee On Alcohol and Other Drugs has adopted the October 1986 report of the Technology Subcommittee which made this dual testing recommendation. [this report is also attached and incorporated into this proffer].

Q Does testing the machine against a known sample of alcohol once a week do anything to protect against these false readings?

A Testing the machine like that is a good idea, but it does absolutely nothing to check whether the machine can tell the difference between deep lung air and contaminated air.

Q Why is that? Is there a difference between testing alcohol in a bottle and alcohol in a person?

A There is a big difference between testing alcohol in a bottle and alcohol in a person. There are many complex mathematical curves that the machine must evaluate to determine if the sample is deep lung air. This is a very tricky business scientifically speaking. This complex interaction of variables is not necessary when analyzing a uniform sample from a bottle and errors are much less likely.

Q Could you give us an analogy.

A The so-called instrument checks referred to in the regulations perform a function similar to checking the gas tank of a car to make sure the engine will start. While the car certainly will not start if it is out of gas, verifying that there is gas does not guarantee that the car will start.

Q How about the machine's self diagnostic mechanism. Doesn't that make sure that no false readings are obtained?

A That is also a good test to perform, but again, it does not perform any sort of test on deep lung air as opposed to air from other sources. If fact, no alcohol at all is tested in this self diagnostic test. It is mainly just a test of some of the internal electrical components to make sure they have not failed.

The problem of isolating deep lung air is one that may not be able to be solved by machine design. It is a very difficult problem scientifically. That is why both the manufacturer in the operator's manual and the Department of Health require the waiting period. If the slope detector worked perfectly, there would be no need for such a procedure. The fact that it exists is proof that it does not.

Q Is the machine ever checked to see if the mechanism that checks for deep lung air is working?

A There is no procedure in place that does this.

Q Would you have to see someone belch or burp during a test in order to have a concern about the test result.

A No. These things can be inaudible, and you can't see alcohol evaporating from tissue within the body.

Q How widespread is GERD.

A It is very common. That is why dual testing is so important. Failure to adopt this approach guarantees that a significant percentage of the people tested in this state will generate false readings.

Q If someone did actually have a .117 alcohol level in their system, would they be at the mental confusion stage with this level?

A Most people would not be.

Q Is a single test of someone who uses Zantac and Tums scientifically acceptable?

A No

Q Is a single test of anyone scientifically acceptable?

A No.

The defense would also call as a witness Scott P. Kotterman who is and was a police officer and at the time of the offense in the case at bar was and had been the defendant's roommate for some time. Mr. Kotterman would testify that before after and during the period of time period of time during which the offense in the case at bar occurred, the defendant frequently consumed Zantac, Tums, and dip. He would also testify that in both his personal and professional opinion, the defendant was not under the influence of alcohol when he picked him up at the police station immediately after he took the breath test.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served on Cynthia Seckerson, Assistant Columbus City Prosecutor, attorney for plaintiff, 375 South High Street, Columbus, Ohio 43215, on September 2, 2004 by delivery.

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Excerpts of Trial Transcript

[201] Why am I telling you this? Obviously, he wasn't sitting there drinking at the time that the officer was trying to give him the test. Well, the importance of that is, there's more than one way alcohol can get into your mouth, your throat, and your system. One way is, certainly, if it comes from the mouth down; but another way is if it comes from the stomach up. If you have—

MS. SECKERSON: Your Honor, I'm going to object at this point and ask for a sidebar.

* * *

[252] of reliability. The Court allowed, over the objection by **[253]** the prosecutor, the displaying of a poster-size board that asked the jurors how reliable they felt breath machines are in Ohio. And no authority was given at that point in time for the objection, but the Court later learned on its own that the State v Vega case and its progeny, including several decisions here in the Tenth District, indicate that once the breath test has passed the motion to suppress, that the general reliability of breath tests are not allowed to be discussed in front of the jury. So any discussion with regard to that was in violation of the well-settled law of Ohio. And Vega was decided in 1984.

* * *

[256] Now, the next issue, have you had a chance to read the proffer that was filed by defense counsel of his expert?

MS. SECKERSON: Your Honor, I believe Miss Cox has had a chance to read it. I have not had a chance to read it.

THE COURT: All right. I have read it. And in reviewing what the proffer is, along with other statements [257] being made by counsel, I'm prepared to make a decision at this point in time with regard to the admissibility of intended evidence that the defense has indicated they plan on calling.

Now, pursuant to the Columbus versus Day case, "It is well-settled that a defendant may not use expert testimony to attack the general reliability of Intoxilyzers as valid, reliable breath-testing machines; however, while a defendant may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood-alcohol levels, he may challenge the accuracy of his specific test result."

The defendant in this case plans on attacking the specific result by calling a witness that will say that he's observed the defendant taking antacids as well as Zantac and use a tobacco product in his mouth. He also plans on calling a witness that will say he observed the defendant at a certain time period after the arrest, and he did not appear intoxicated to him. And I also know that this witness is a police officer who's been trained to observe these type of characteristics of individuals.

The facts of the Weese case, in which defense counsel was the attorney on the appeal, indicate that at that trial, if the Court would have allowed the evidence he intended to bring in, evidence that the particular machine [258] used in this case had previously malfunctioned and had been subject to various repairs, that an expert, Dr. Alfred Staubus, would testify that if a person tested at a .139 level, if that person was not an alcoholic and if that person did not exhibit the symptoms of intoxication appropriate for an .139 level, then it would be a likely conclusion that something went awry with the testing process; that the defendant's girl friend would

testify that she was with the defendant on the night of his arrest and that did he not exhibit the symptoms of intoxication enumerated by the defendant's expert, Dr. Staubus. Additionally, that the defendant will testify himself that he did not exhibit the symptoms of intoxication enumerated by the expert. In addition to that, the defendant's employer would testify that the defendant has never exhibited symptoms of being an alcoholic as enumerated by Dr. Staubus. And in addition to that, the defense would have extensively cross-examined the arresting officer and any other officers who saw the defendant on the night of his arrest regarding the presence or lack of symptoms expected to be associated with one testing at a .139 level as enumerated by Dr. Staubus.

Now, the testimony that was proffered by Dr. Staubus mainly centers around the testimony of—or the hypothetical situation that the defendant has an acid reflux **[259]** condition, not anything to do with whether or not the specific test—not that the specific concentration of alcohol in his blood at the time wasn't correct, but that if someone was taking Zantac, Tums, and used dip, what would that mean?

The doctor, in his proffer, said that he would only be suspicious that a person had a gastroesophageal reflux disease. I believe that the challenges to the specific test, there needs to be some reliable indicia of a specific condition added with more probative evidence of a possible error in the test rather than an inference upon an inference, such as a roommate saying he uses Tums and Zantac and then an expert saying that that could be a suspicion of an acid reflux disease.

As has been told before on the record, I believe that if you were going to call a medical doctor to testify that your client experienced this condition, we would be able to examine on the record in the presence of the jury and

outside the presence of the jury to what level that condition affected this particular defendant. Counsel for the defendant has enumerated several conditions that he experiences and that they can be different for different defendants. Without any knowledge, scientific knowledge, with regard to this disease and specifically how it affects this defendant, I believe that the defense does not raise a **[260]** valid challenge to this specific test.

So as the evidence by Dr.—the proffered testimony as given by Dr. Staubus, I am not going to allow his testimony, because I do not feel, according to the case law, that it is—it meets the test of the Weese case and other Ohio law that I've looked at.

Are there any other issues before—Wait a minute. Also, there's a lot of proffered testimony that Dr. Staubus thinks that two tests ought to be given every time for every individual that takes the test, which has nothing to do with this case.

* * *

[267] Then the other question, it seems like the ruling is, I call Dr. Staubus, I just can't have him say anything that would help our case. I'm wondering whether that's a vain effort. If our entire testimony is what's in the proffer and none of it's allowed, then what's the point in even getting him down here or calling him? Cost my client $200 an hour to get him down here to say nothing.

Am I misunderstanding the Court's ruling, or am I pretty much on target?

THE COURT: I believe it's well-settled in Ohio that there are certain things that Dr. Staubus is allowed to **[268]** testify and there's other things that he is not allowed to testify. I think we've gone over them. I think that you are extremely well aware of those since you

were the attorney on the Weese case which set forth that law with regard to what an expert can and cannot testify to in this area. So if I need to restate the law on this, I will, however, I believe you're perfectly aware that he's not allowed to talk about general reliability, the fact that he believes that two tests need to be given in every case, and other such evidence that might put into question the reliability of the test.

* * *

[397] MS. SECKERSON: I wasn't positive. Your Honor, those I am just proffering.

And then I would move to admit the original exhibits from the motion hearing. And if I can have just one second to get the numbering on those.

And I believe Mr. Levering has probably already moved to admit these, but I'm not positive without checking the court file, so—or the transcript, so I'm going to move to admit those exhibits from the motion hearing, which **[398]** are State's Exhibits 1 through 18. And I guess we'll call the first three trial exhibits and the previous ones motion hearing exhibits.

THE COURT: I'm actually not sure if you moved to have those admitted or whether or not it was going to be stayed pending a decision by the Court.

Go ahead, Mr. Johnson.

MR. JOHNSON: I don't recall myself. Thanks, Judge. Yeah, I obviously have to object to all of these. Well, the posters, for purposes of identification, I don't care if they come in for that purpose. The general basis of our objection to all the documentary evidence was laid out in great detail in the previous filings in this case, and I won't belabor those points. I'll just incorporate that by

reference. But, generally, we think, because of the rubber stamp and other issues with regard to certificates, that the people doing what they were doing weren't authorized to do it, and therefore the documents and everything—every document prepared by people who weren't properly authorized shouldn't come into evidence.

There is, however, something of a new development along those lines that was not included in the brief. And the reason it wasn't included in the brief is because it wasn't the law then. The United States Supreme Court recently decided Crawford versus Washington dealing with [399] documentary evidence in criminal cases, and they said documentary evidence deprives the defendant of the right to cross-examination and that sort of thing. So we would list as an additional ground Crawford versus Washington. I actually do have the citation on that, I suppose I should read into the record as well. That is—It's a new case so there isn't a permanent one, but it's 72 United States Law Week 4229, and it was decided March 8, 2004. And the United States Supreme Court, I have not seen—oh, it's 124 Supreme Court 1354. There is a Supreme Court cite on that too.

* * *

[450] machines. The general reliability of breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence presented regarding the defendant's specific test and the specific machine used to test him.

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DEC 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(1)

NO. 06-704

In The Supreme Court of The United States

NICHOLAS SABO,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a statutory scheme that preserves the right of defendants to challenge the reliability of the specific testing device and procedure remove a challenge to the general reliability of an established science that is not an essential element of an offense from trial litigation?

2. Where a crime is defined as driving with an impermissible concentration of alcohol in a person's blood irrespective of actual impairment, may a person be found guilty of the offense where the State presents evidence of the prohibited concentration?

3. May a trial court exclude evidence of a speculative defense predicated on a medical condition where a defendant fails to provide any testimony that the defendant was suffering from the medical condition at the time of the test or that he even had the medical condition?

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Statement of the Case

The instant case raises two issues: first, the constitutionality of Ohio's statutory scheme that allows defendants to challenge specific breath alcohol test results in drunk driving cases but prohibits challenges to the general scientific principles and testing devices. Second, whether the trial court erred in suppressing expert testimony predicated on purely speculative opinions that were not factually supported. Because neither issue raises a substantial question under the federal Constitution, this Honorable Court should deny Petitioner's Writ of Certiorari.

Petitioner argues, "The jury was instructed that it had to believe the test was accurate and a verdict was rendered against the defendant." Petitioner's Writ of Certiorari ("PWC"), 3. This statement is inaccurate. As noted in Petitioner's brief, the jury was instructed:

> The general reliability of the breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence

> presented regarding the defendant's specific test and the specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy.

App. 1a, Tr., pg. 450, ln. 14-22. The jury was never instructed that it had to believe the test result was accurate. Rather, it was specifically instructed to evaluate all the evidence related to the test.

Petitioner also asserts that the State of Ohio has admitted that the Gastro Esophageal Reflux Disease ("GERD") defense is tacitly true. PWC, 3. There is no evidence in the record to suggest that the State or the manufacturer of the device has ever admitted such a defense to be "true."

Finally, Petitioner misquotes the State as arguing that the State did not need to prove each element of the underlying offense beyond a reasonable doubt. PWC, 5. Specifically, Petitioner uses an out of context quote that; "Once again, [Petitioner] is seeking to place a heretofore unknown burden

upon the State requiring it to first have evidence found admissible and then requiring proof beyond a reasonable doubt that the evidence is credible." PWC, 5.

However, in context, this quote was responsive to Petitioner's assertion before the Tenth District Court of Appeals for Ohio that a BAC test result should be inadmissible unless its reliability is proven beyond a reasonable doubt. No court has ever found that evidence must meet a beyond a reasonable doubt standard before being admissible.

It has never been the State's position that it is relieved of the burden of proof at trial after a test result is admitted into evidence. Such a scheme would be repugnant to the United States and Ohio Constitutions. However, Petitioner's position that the State must prove the reliability and credibility of the breath test beyond a reasonable doubt *prior* to admission is unsupported by any law of this Court or procedural requirement of the State of Ohio.

Summary of the Argument

This Honorable Court should deny Petitioner's Writ of Certiorari because it does not present a substantial federal constitutional question. The State of Ohio has criminalized the operation of a vehicle with a prohibited blood alcohol concentration ("BAC"). These offenses are known in Ohio as "per se OVI" (formerly "OMVI") offenses because they establish a prohibited BAC regardless of whether the defendant is actually impaired by the alcohol. See, ORC 4511.19, et seq. The Supreme Court of Ohio has determined that the general scientific reliability of the tests is not subject to challenge in criminal cases. *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (Ohio 1984). The import of this case is that while the basic science and the testing devices are not subject to general challenge, defendants retain the right to challenge the credibility of the specific result in their case. The General Assembly has delegated the responsibility of determining the general reliability of the science and testing

devices to the Director of the Department of Health. The State of Ohio, through its Director of Health, has adopted detailed criteria for the administration of breath tests. *Vega*, 12 Ohio St.3d at 187. A test may not be admitted unless it is shown that it substantially complied with the criteria mandated by the Director of Health. *Defiance v. Kretz*, 60 Ohio St.3d 1, 3, 573 N.E.2d 32 (Ohio 1991).

However, even where a test is admitted, a defendant "may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid means of determining [BAC.]" *State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (Ohio 1984). Thus, while defendants may not challenge the tests in a general or generic fashion, they may still admit any irregularity demonstrating whether the machine was in proper working order, whether the operator of the machine properly used the machine, and whether a

particular condition of the defendant may have affected the test. *Id.*

This statutory scheme does not amount to an unconstitutional presumption of guilt. The State still bears the sole burden to prove beyond a reasonable doubt that Petitioner's BAC was above the proscribed limit. Ohio's statutory scheme merely prevents myriad redundant hearings on the general reliability of a science that the Ohio General Assembly has found to be reliable. Criminal defendants are still free to challenge the credibility of their particular test results. Therefore, this Court should deny Petitioner's Writ of Certiorari.

Additionally, the trial court correctly denied Petitioner's attempt to obfuscate the central issues of the case with speculative and unsupported evidence. This decision was consistent with this Court's long recognized deference to the right of States to provide their own rules of criminal procedure so long as those rules are not arbitrary. And

finally, Petitioner has failed to demonstrate that Ohio's statutory scheme violates any of the constitutional provisions that Petitioner nominally states have been violated. This Court should deny Petitioner's Writ of Certiorari because no substantial federal constitutional question has been raised by Petitioner.

Argument

Ohio's statutory scheme does not implicate Petitioner's federal constitutional rights, and therefore this Court should deny Petitioner's Writ of Certiorari. Petitioner has argued three primary bases for the granting of his Writ, however, none of these bases independently or cumulatively justify granting the Writ of Certiorari. First, Ohio's statutory scheme does not create an unconstitutional presumption of guilt. Second, the trial court in the instant case correctly found that Petitioner failed to support his proposed defense with competent factual evidence. And third, Petitioner's

"catch all" argument that Ohio's scheme violates various constitutional provision is without merit.

A. The Ohio OVI scheme does not create an unconstitutional presumption of guilt.

This Supreme Court of Ohio's ruling in *State v. Vega* is not in conflict with this Court's ruling in *Francis v. Franklin*, 471 US 307 (1985). In *Franklin*, this Court addressed jury instructions that specifically shifted the burden of proving the *element* of intent away from the State. *Id.*, 317 (defining unconstitutional presumptions as those that alleviate the burden of the State in proving "elements" of the offense). In his appeal to the Supreme Court of Ohio, Petitioner conceded the statutory scheme did not shift a burden of proving guilt, but rather that the instant case involved "a conclusive presumption of reliability, not of guilt." Appellant's Memorandum in Support of Jurisdiction to the Supreme Court of Ohio, 11, App. 1a. Thus, *Franklin* stands for the proposition that it is unconstitutional to have a presumption of guilt, Petitioner argued that it was unconstitutional to have

a presumption of reliability. These two issues are inapposite. It is unclear whether Petitioner is abandoning this argument and is attempting to argue that the instant case involves a presumption of guilt. If so, this Court should find that Petitioner's argument is waived for failure to raise it in the lower courts.

Further, the Sixth Circuit Court of Appeals has previously rejected the argument that Ohio's OMVI laws contain an unconstitutional presumption of guilt. *Miskel v. Karnes*, 397 F.3d 446, 457 (6th Cir. 2005). Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question and this Honorable Court should deny the Writ of Certiorari. Under virtually identical facts and arguments, the Sixth Circuit noted:

> The jury, however, was not instructed to presume Petitioner's guilt of the offense on the basis of the breath test. Moreover, contrary to Petitioner's assertion that *Vega* removed the issue of a breath test's reliability from the factfinder's domain, the specific machine's reliability was very much an issue at Petitioner's trial.

. . .

> Finally, the judge's instruction to the jury commits the issue of the test's reliability to the jury's judgment and plainly places the entire burden on the prosecution.

Miskel, 397 F.3d at, 456. This accords with the Supreme Court of Ohio's discussion of the issue in *Tanner*,

> The defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels. The jury may consider those specific test results, and all other relevant evidence, in ascertaining whether the state has shown beyond a reasonable doubt that the defendant has violated the statute. There is thus no presumption of guilt.

Tanner, 15 Ohio St.3d at 6. Contrary to Petitioner's assertion, Ohio's OVI laws neither create an unconstitutional presumption nor shift the burden of proof to the defendant. Ohio juries are not instructed that they must impose a finding of guilt. Indeed, the jury in *Miskel* was given a verbatim instruction in the instant case, "You must evaluate all the evidence presented regarding the test and its accuracy." App.

1a, Tr., pg. 450, ln. 21-22. Put simply, the Ohio statutory scheme does not require or order a jury to believe a test result that it is admitted into evidence. Nor does it shift the burden to criminal defendants to disprove an element. For these reasons, this Court should find that Ohio's statutory scheme does not create an unconstitutional presumption, and should deny Petitioner's Writ of Certiorari.

In order to demonstrate an unconstitutional presumption, Petitioner relates to this Court an analogy involving a weight scale. PWC, 18-20. Under this analogy, a finder of fact is told that a suspect could not have weighed more than 250 pounds. The defendant is 275 pounds, but is weighed on a scale with a maximum reading of 240 pounds, thus resulting in a weight of 240 pounds. Petitioner argues that this demonstrates the problem of not allowing an attack on the *general reliability* of a testing device.

However, this analogy is incorrect. Nothing in Petitioner's analogy would call into question the general

scientific principles of weight measurement or the ability of the scale to accurately weigh things *generally*. The challenge would be related to a specific deficiency of the device as it related to the specific subject tested. Such a challenge would be within the scope of challenges allowed in Ohio, and Petitioner would simply provide evidence to the factfinder that he weighed 275 pounds, while the maximum reading of the scale was 240 pounds. Thus, the test would be a specific challenge; precisely the type of challenge that is allowed in the State of Ohio.

Additionally, extension of Petitioner's analogy demonstrates how criminal cases would devolve into a quagmire of "scientific" hearings. For example, in drug offenses involving quantities, Petitioner's theory allowing general challenges would allow defendants the right to challenge, in essence, the laws of physics. That is, not only would criminal defendants be able to attack a particular drug measuring scale or result, but the defendant would be

allowed to attack the very science of weights and measures in every drug case. Under Petitioner's theory, a legislature would be barred from recognizing the generally accepted principles of physics behind weights and measures, and would be barred from specifically noting scientifically accepted forms and devices used in measuring weight.

This result would be patently absurd. Criminal defendants should be afforded the necessary protection of challenging the specific result in their case. However, there is no logical basis for extending to a defendant the right to challenge the general scientific principles. It would serve no valid purpose to require the State to recreate the proverbial wheel in every criminal prosecution relying upon some type of scientific evidence, particularly where the legislature has already determined that the science is generally reliable. Interpreting the Constitution in such a manner would lead to endless, needless litigation over generally accepted scientific

principles that frequently will have no relevance in the particular case in which the issue is raised.

Because the instant case does not involve a presumption of guilt as to any element of the offense charged, and because the State bore the sole burden of proof on each element charged, this Honorable Court should deny Petitioner's Writ of Certiorari.

B. Petitioner failed to support a speculative defense, and therefore the trial court correctly ruled the defense inadmissible.

Criminal defendants do not possess unfettered rights to present evidence merely because it may cause a trial jury to have doubt. Indeed, as this Court recently stated, State lawmakers "have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina* (2006), 126 S.Ct. 727, 164 L. Ed.2d 503, 2006 US LEXIS 3534, *2-3 (emphasis added). Both the trial court and the Tenth District Court of Appeals for the State of Ohio made factual findings that Petitioner

failed to provide sufficient foundational evidence to allow Petitioner to raise a defense related to a medical condition:

> As previously noted, the trial court indicated that it excluded defendant's challenge to the accuracy of his specific test results based on a lack of evidentiary support while separately excluding the challenge to the general accuracy of the testing procedure. We cannot find that the trial court erred in this regard.
>
> . . . [D]*efense counsel at no point indicated that testimony would be offered at trial to establish that defendant experienced an episode of GERD at the time he took the breath alcohol test or that he even had the condition.* Indeed, defense counsel admitted that Dr. Staubus would testify only "in the abstract" about the possible effects of GERD on breath alcohol tests and that neither defendant nor a medical professional would testify that defendant had GERD. Thus, to the extent defense counsel's argument and the proffered testimony could be viewed as presenting a challenge to the reliability of defendant's specific test results, we find that the trial court properly excluded the testimony based on a lack of evidentiary support.

State v. Sabo, 2006-Ohio-1521, 2006 Ohio App. LEXIS 1394, *16-17 (10th Dist., Ohio, 2006) (emphasis added). Petitioner intended to present evidence that a friend of his had seen him take the non-prescription drug Zantac and

Tums. *Id.*, at *8. Petitioner, however, was unwilling to present evidence that he had GERD, and he was unwilling to call his medical doctor to testify that he had GERD.

Indeed, Petitioner conceded that Dr. Staubus' testimony was completely irrelevant to any condition Petitioner might have had. Petitioner argued:

> I'm not going to ask Dr. Staubus anything in particular about [Petitioner]. I'm not going to get him to say [Petitioner] has reflux, or anything of that nature. . . . I will ask him hypothetically, not specifically with regard to [Petitioner], but if somebody's using Zantac, if somebody is using Tums, if they're using dip, would that give you any concerns from a scientific standpoint as to the test accuracy?

App. 2a, Tr., pg. 208, ln. 24-25, pg. 209, ln. 1-8.

Thus, Petitioner's defense was not even predicated on Dr. Staubus' speculation that Petitioner might have had GERD because Petitioner conceded that Dr. Staubus' testimony was not meant to express an opinion on the probability that Petitioner had GERD. If Dr. Staubus' testimony was not

designed to express a probability that Petitioner himself had GERD, then it was wholly irrelevant to the instant case.

This Court has spoken on a defendant's failure to factually support an affirmative defense and found that where the foundation is insufficient the entire defense should be suppressed. *United States v. Bailey*, 444 U.S. 394, 416 (1980). Although it is unclear whether GERD constitutes an affirmative defense to an OVI charge, the logic underlying the *Bailey* decision applies equally. Even if believed, Petitioner's proffer would have never factually established that Petitioner had GERD or suffered from it on the night in question. It would have establish only that Petitioner took Zantac and Tums. Petitioner's expert's reluctance to relate this directly to Petitioner, and Petitioner's failure to bring forth evidence available to him to establish his medical condition were ultimately fatal to his proposed defense.

Similarly, this Court's decision in *Holmes v. South Carolina* clearly recognizes the broad latitude the General

Assembly has in adopting rules of admissibility. *Holmes*, 126 S.Ct. at 1731. The *Holmes* Court took up the specific applicat[illegible] of this principle in relation to defenses predicated on the commission of the crime by another person. In doing so, the Court noted that frequently evidence of such a defense is so "speculative or remote" that it is properly excluded by trial courts. *Holmes*, 126 S.Ct. at 1733. Thus, the Constitution recognizes that a defense may be excluded where it is too speculative or remote.

In this case, the trial court noted that in order for Petitioner to establish his defense, "There's a lot of people out there using Zantac . . . that don't have acid reflux, so I think you're taking a quantum leap to try to get in the fact that your client might have some disease that he may or may not have that we don't know." App. 2a, Tr., pg. 209, ln. 15-19. Because Petitioner's counsel offered nothing more than idle speculation regarding Petitioner's condition, the trial court stated,

> I also don't think that you're in the best position to diagnosis your client as to what he may have. . . . I'm not going to allow you to bring up anything with regard to the possibility that he may have acid reflux unless you've given [the prosecutor] some indication that that has some relevance to this case.

App. 3a, Tr., pg. 212, ln. 21-25, pg. 213, ln. 1-2. While Petitioner's counsel informed the trial court that Petitioner had been diagnosed with GERD (App. 3a, Tr., pg. 213, ln. 4-5), Petitioner was unwilling to testify on his own behalf or to call his doctor to do so.

The trial court not only found there was an insufficient foundation for Petitioner's defense, it also directed Petitioner as to what steps he could take to remedy this deficiency. The lower court noted that "If, in fact, your client had an acid reflux problem . . . then that should be testified to by someone, maybe his doctor, maybe someone else." App. 3a, Tr., pg. 204, ln. 14-17. It is unclear why Petitioner chose not to have his doctor testify or why he chose not to testify on his own behalf, but ultimately Petitioner alone bore the burden to

establish his defense. He failed to do so with his initial proffer, and despite being given a reasonable alternative method to remedy the deficiency, Petitioner chose to proceed to trial without attempting to raise his defense properly. Petitioner's argument that he was improperly denied the opportunity to raise a defense is belied by the reality that Petitioner simply abandoned his defense when he was not allowed to raise it in a purely speculative fashion.

This Honorable Court should find that the trial court below did not abuse its discretion when it prevented Petitioner from putting a purely speculative defense before the jury, particularly where the trial court offered remedial steps that Petitioner could have taken. Petitioner's failure to assert his defense in a competent fashion should not constitute an error on the part of the State or the trial court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

C. Petitioner waived any argument under *Holmes v. South Carolina*, and any such argument would not support Petitioner's claim.

Holmes v. South Carolina clearly recognizes that State lawmakers "have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, 126 S.Ct. at 1731 (emphasis added). The right of a defendant to admit evidence is only abridged by rules that infringe upon that right "and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.*, at 3. This is not a new principal of law. See *Rock v. Arkansas* (1987), 483 US 44, 58, 56. This argument was not raised at trial court despite the fact that it has been embedded in federal constitutional law for two decades. Thus, although *Holmes* was recently decided, the principle of law it is based upon was well established at the time of trial. Because Petitioner did not raise the issue at trial or on appeal, this Court should find it waived.

Even if this Court considered Petitioner's *Holmes* argument, the Court should find that Petitioner has misapplied it. Petitioner has fundamentally misconstrued the trial court's ruling. Petitioner asserts to this Court that "[T]he GERD evidence is falsely perceived as being speculative not due to the nature of the GERD evidence itself, but rather because it questions the court's belief about the accuracy of the test." PCW, 25. However, there is no evidence that this occurred in the lower court. The trial court did not suppress the GERD defense because it felt the defense was meritless, it did so because Petitioner failed to lay an appropriate foundation for it. Specifically, the trial court stated, "You cannot say anything with regard to your client's condition that you don't fully intend on proving in trial." App. 4a, Tr., pg. 214, ln. 16-18.

Indeed, the trial court specifically indicated that testimony from Petitioner's doctor or anyone else that established Petitioner actually suffered from GERD would

have remedied this deficiency. App. 4a, Tr., pg. 204, ln. 14-17. It is clear that the trial court did not make a value judgment regarding the merits of the defense itself.

Petitioner's argument is, essentially, that *Holmes* allows a criminal defendant a virtually unfettered right to present any evidence—no matter how speculative or tenuous—that could lead to any possible doubt. This is not the position of the *Holmes* Court. Under *Holmes*, the only question this Court would need to answer in resolving the issue is whether the prohibition on challenging the general reliability of the breath test was "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 126 S.Ct. at 1731.

Because "[t]he defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels," the prohibition on challenging the general reliability of the breath test is not arbitrary or

disproportionate to the purposes it serves. *Tanner*, 15 Ohio St.3d at 6.

It was for this precise reason, that the Sixth Circuit Court of Appeals rejected a similar argument challenging the *Vega* Court decision:

> We note in closing that the district court relied upon a more recent decision of the Supreme Court to deny Petitioner's claim that the trial court denied her right to present a defense. *See United States v. Scheffer* . . .. In Petitioner's case, just as in *Trombetta*, there were various effective means of challenging the accuracy and reliability of *her* breath test without putting the reliability of BAC Verifiers in general at issue.

Miskel v. Karnes (2005), 397 F.3d 446, 454 (internal citations omitted). Although *Miskel* deals with a different standard under the Anti-Terrorism and Effective Death Penalty Act, 28 USC § 2254, its analysis is still noteworthy.

The statutory and regulatory scheme in Ohio serves the valuable purpose of preventing Ohio's OVI cases from devolving into a quagmire of hearings on the general reliability of a scientifically accepted principle and carefully

considered criteria adopted by the Director of Health. The scheme is not disproportionate to the goals it is designed to serve. If the scheme attempted to prevent any attack on the reliability of the breath testing results, it would be disproportionate because it would prevent defendants from arguing that the machine had malfunctioned, that the machine had been improperly operated, or that some other factor adversely affected the machine's accuracy. However, the Ohio scheme does not do this. It preserves all specific challenges to the test result for consideration by the jury.

Additionally, the Ohio scheme cannot be considered "arbitrary." The scheme delineates specific devices and specific procedures for those devices. Indeed, it is worth noting that if the State of Ohio were to acquire a breath test result on a machine not approved by the Director of Health, the result would be inadmissible to prove a per se offense. It would be of no moment that the State could show that the device was as generally reliable as those approved by the

Director of Health. Just as general reliability of a breath testing device is immune from attack by a defendant, the State is proscribed from attempting to use the general reliability of a non-approved device as a basis for admissibility.

Ohio's OVI laws allow adequate protection to criminal defendants by allowing them to challenge specific test results. Further, they serve the logical purpose of preventing needless litigation over a generally accepted principle, and are narrowly tailored because they follow specific criteria set forward by the Director of Health. For theses reasons, the statute is not arbitrary or disproportionate, and this Court should deny Petitioner's Writ of Certiorari.

D. Ohio's statutory scheme does not violate the holdings of any of the various cases Petitioner has cited.

Petitioner has cited numerous cases from this Court as supporting Petitioner's Writ of Certiorari, however, Petitioner has not provided analysis of the issues Petitioner

claims are raised by the instant case. This Court should deny Petitioner Writ of Certiorari because none of the cases cited by Petitioner are relevant to the instant case.

1. Neither *Apprendi v. New Jersey* or *Blakely v. Washington* are relevant to the instant case.

Apprendi v. New Jersey, 530 US 466 (2000) and *Blakely v. Washington*, 542 US 296 (2004), deal with the method of proof required to increase a sentence beyond its statutory maximum. Appellant's case was submitted to a jury, and every relevant fact was found by the jury, therefore *Apprendi* and *Blakely* are of no import in the instant case. Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question.

2. No testimonial evidence was presented at trial and because Petitioner failed to object to the admission of any evidence based on *Crawford v. Washington*.

Crawford v. Washington, 541 US 36 (2004), deals with the admission of testimonial evidence as it relates to the

confrontation clause of the United States Constitution. Petitioner did not object to the admission of any testimonial evidence during the trial, nor was any testimonial evidence presented against him by a witness that did not testify, and thus there was no confrontation clause violation. Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question.

Conclusion

Ohio's statutory and regulatory scheme allows OVI defendants the right to fully and vigorously challenge the specific results and testing procedure and therefore does not violate the Constitution. Petitioner's failure to lay a competent foundation for his GERD defense is solely his responsibility, and therefore the trial court correctly denied the speculative evidence he sought to admit. For these reasons, there was no substantial federal constitutional right

implicated in the instant case, and this Honorable Court should deny the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

"The general reliability of the breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence presented regarding the defendant's specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy."

Tr., pg. 450, ln. 14-22

"The argument here is that there is a conclusive presumption of general reliability of the test, not of guilt."

Appellant's Memorandum in Support of Jurisdiction to the Supreme Court of Ohio, 11.

"You must evaluate all the evidence presented regarding the test and its accuracy."

Tr., pg. 450, ln. 21-22

"I'm not going to ask Dr. Staubus anything in particular about [Petitioner]. I'm not going to get him to say [Petitioner] has reflux, or anything of that nature. I'm going to ask him to explain what that is in the abstract, how it works, how it can affect the test result, without any reference to [Petitioner]. The tie-in there will be, I will ask him hypothetically, not specifically with regard to [Petitioner], but if somebody's using Zantac, if somebody is using Tums, if they are using dip, would that give you any concerns from a scientific standpoint as to the test accuracy?"
Tr., pg. 208, ln. 24-25, pg. 209, ln 1-8.

"There's a lot of people out there using Zantac, Tums, and other antacids that don't have acid reflux, so I think you're taking a quantum leap to try to get in the fact that your client might have some disease that he may or may not have that we don't know."

Tr., pg. 209, ln. 15-19

"I also don't think that you're in the best position to diagnosis your client as to what he may have. So let's get on with opening statement. I'm not going to allow you to bring up anything with regard to the possibility that he may have acid reflux unless you have given her some indication that that has some relevance to this case."

Tr., pg. 212, ln. 21-25, pg. 213, ln 1-2.

"I have, and I can answer your question directly. He, in fact, did go to the doctor finally. He was diagnosed he does have it."

Tr., pg. 213, ln. 3-5

"If, in fact, your client had an acid reflux problem that was specific to your client, that was not aware by the officer, then that should be testified to by someone, maybe his doctor, maybe someone else."

Tr., pg. 204, ln. 14-17.

"You cannot say anything with regard to your client's condition that you don't fully intend on proving in trial."
Tr., pg. 214, ln. 16-18.

"If, in fact, your client had an acid reflux problem that was specific to your client, that was not aware by the officer, then that should be testified to by someone, maybe his doctor, maybe someone else."
Tr., pg. 204, ln. 14-17.

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(2)

No. 06-704

IN THE SUPREME COURT OF THE UNITED STATES

Nicholas Sabo

Petitioner

v.

State of Ohio

Respondent

On Petition for a Writ of Certiorari

To the Supreme Court of Ohio

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1a. The presumption in question involves an element of the offense.

It strains credulity to argue that conclusively presuming the general reliability of the breath test does not involve the establishment of an element of the offense.

There are two ways to be convicted of drunk driving in Ohio. The first is for the defendant to have a prohibited concentration of alcohol. The state must establish this element and the sole way of doing this is by testing bodily substances for alcohol. The general reliability of the testing machine is an absolutely necessary ingredient in proving this element. Thus, presuming the general reliability of the testing machine is a direct and essential part of establishing an element of the offense. As such, it cannot constitutionally be presumed.

The second way to be convicted of drunk driving in Ohio is the old fashioned way of proving that alcohol affected the defendant's ability to operate a vehicle. In *voir dire* it was established that all of the jurors felt that if one failed the test that meant not just that he was over a certain level, but it also meant that the he was under the influence. Trial Transcript, p. 85 l. 13-88 l. 22.

Thus, for all practical purposes presuming the general reliability of the testing machine is a direct and essential part of establishing this element of the offense as well. As such, it cannot constitutionally be presumed.

In a certain sense, the Respondent is correct when on page 11 of its brief it contends that "Petitioner conceded that the statutory scheme did not shift a burden of proving guilt..." Without delving more deeply into the peculiarities of Ohio law than is necessary for these purposes, suffice it

to say that the statute does not create a conclusive presumption of guilt. That presumption was created by the Ohio Supreme Court in *State v. Vega*, (1984) 12 Ohio St.3d 185, not by the legislature. While the former (before 1983) statute had presumptive language, the one the Petitioner was charged with does not. The Ohio conclusive presumption is a judicial creation.

Judicial conclusive presumptions are, nevertheless, just as unconstitutional as legislative ones. Petitioner has consistently and vigorously raised the mandatory conclusive presumption issue at every level. The Respondent has not uncovered any startling new admission or change in position. Petitioner's remark was merely misconstrued.

b. *Miskel v. Karnes* is inapposite.

There are several reasons why *Miskel v. Karnes* (2005) 397 F.3d 446, does not apply to this case. To begin with, *Miskel* was decided under the recently amended federal *habeas corpus* law.

Under the new legislation, the federal court's ability to correct injustice in *habeas corpus* cases has been severely limited. The mere fact that the federal court disagrees with the state court or that it would have decided differently is not enough. As the court put it:

> We may only overturn the district court and grant a writ of habeas corpus if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

Id, 451. A state court decision that is contrary to a federal circuit court decision or which is an unreasonable application thereof is not actionable under the act. There must be a United States Supreme Court decision on the issue. Furthermore, and more importantly, lower federal courts must generally defer to state court interpretations of state law: "... we re-emphasize the significance in this case of the highly deferential AEDPA standard of review... *Id,* 458.

In addition, the standard of review in *Miskel* was so narrowly restricted that Supreme Court *dicta* supporting her position was insufficient. "The second flaw with Petitioner's reading of *Trombetta* is that it is based on *dicta*, rather than the Court's holding, " *Id,* 455. Thus even if the court felt that what happened to Ms. Miskel was unconstitutional and even if it believed that the United States Supreme Court was of the same opinion, this would not be a sufficient basis to grant relief under AEDPA.

The nonbinding *dicta* from the United States Supreme Court decision in *California v. Trombetta,* (1984) 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 which the *Miskel* court cited but could not follow was this:

> ...a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were truly prone to erroneous readings, then *Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt.*
>
> *Id.* at 489 n.10 (citing Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560 (1979).

Miskel, supra, 454, (emphasis added).

As a result, a holding that an AEDPA claim was not established in *Miskel* is not the same thing as a holding that the alcohol testing processes used in the case at bar is acceptable. Nor is it even an indication as to the federal court's views of the way that this Court might decide the case or indeed the way the Sixth Circuit might decide the matter if confronted with the issue directly rather than in the context of an AEDPA claim.

Another problem with *Miskel* as precedent in the case at bar is that there is also a critical factual distinction between *Miskel* and the instant matter. In the case at bar, the only evidence submitted to the jury regarding the element of a prohibited concentration was the mere test result. In *Miskel*, the jury heard both direct testimony and cross-examination on this issue.

While this was not clear from the appellate opinion, the district court opinion demonstrates this:

> ...Petitioner was permitted to cross-examine the officer who operated the BAC Verifier concerning the specific administration of petitioner's test. The officers were further subject to cross-examination concerning their knowledge of the functioning of the BAC Verifier on the night in question, and compliance with the applicable Department of Health Rules and Regulations. Officer Wetzel was also allowed to answer questions about an earlier calibration of the BAC Verifier which was determined not to be within the acceptable tolerance level. Transcript, pp. 155-158. Petitioner's counsel then used the information gleaned from the cross-examination

> to argue in his summation to the jury that the results of the specific test were not reliable.

Miske vs. Karnes (S.D. Ohio 2003), Case No. C2-01-98, unreported p. 11-12.

A further problem with *Miskel* is the federal court's misperception of the practicability of using Ohio civil declaratory judgment law as a device for asserting innocence in a criminal case. The magistrate that originally heard the case in *Miskel* apparently did not know a lot about what would happen if redress of the constitutional infirmities in Ohio's breath testing law were to be addressed in a civil declaratory judgment matter rather than in the criminal case itself.

To begin with, the defendant would become the plaintiff in such a civil action and would therefore bear the burden of proof. The defendant should not have to unconstitutionally assume the burden of proof in a civil case in order to prove his innocence in a criminal one. The standard, would most likely be the abuse of discretion standard, which is a very difficult standard to meet. Not only would the burden of proof be shifted, but an extremely difficult burden to meet would be placed on the defendant in order to prove his innocence in a criminal case.

As a practical matter, a civil declaratory judgment action in a Court of Common Pleas civil case is almost always going to take longer than an OMVI case in Municipal Court. The municipal case would be over with before innocence could be established and the appeal time would have run. If the federal court in *Miskel* thought this would be an effective remedy it either did not know much about state court procedure or it did not think things through carefully.

c. Striking down the unconstitutional presumption will not subject the laws of physics to defense challenges.

It is not a law of physics that the BAC Datamaster has a flawless sample collection design. Nor is this factually true. The unconstitutional presumption created in *Vega* has the net effect that under Ohio law design defects cannot be raised once the machine has been approved by the retired police officer without scientific credentials who works for the Department of Health.

The design defect in the sample collection mechanism applies to all BAC Datamaster machines. Thus raising such a challenge is a challenge to the general reliability of an approved testing machine and is forbidden under *Vega*. Allowing challenges to the sample collection mechanism of the BAC Datamaster will not force courts to reconsider whether a feather and a hammer fall at the same speed in a vacuum or to revisit the first law of thermodynamics.

The scale analogy provides an illustration of why a general challenge to an approved testing machine does not, of necessity, entail an assault upon the laws of physics. If the dial on a particular scale stuck at 240 pounds that would be a specific challenge. If no scale of that manufacturer had a dial marking over 240 pounds, that would be a general challenge to the approved machine. Since general challenges are prohibited, perfectly valid and truthful evidence would be barred.

It would not be an assault on the laws of physics or those of weights and measurements to show that all approved scales including the one used are incapable of weighing a 275 pound defendant accurately. If the defendant's only defense was that he weighed more than

the machine could measure, giving him the option of presenting the nonexistent defense that the scale dial on his particular scale was stuck would not cure the illegal presumption. Nor would it keep the jurors from wrongfully concluding that the defendant weighted 240 pounds rather than 275.

If *Vega* is overturned, the only result will be that for the first time in a generation, a defendant will be able to have an actual trial in an Ohio drunk driving cases rather than just the pretense of a trial. While it may seem like a quagmire to the Respondent not to have the only contested issue in the case conclusively presumed in favor of the state, that is the price of justice. What is happening now in Ohio is not justice.

d. The evidence the petitioner attempted to present could not have been deficient because he had no burden to present evidence in the first place.

A mandatory conclusive presumption does not become constitutional because a defendant does not assume a burden of proof that has been unconstitutionally thrust upon him. Ohio's complaint that there was a failure of proof on the defendant's part only serves to highlight the fact that the burden of proof was unconstitutionally shifted to him.

The Respondent appears to believe that GERD is an affirmative defense. It is not. If GERD is a factor, the argument is that the element of a prohibited concentration has not been established. The prosecution must always bear the burden on this issue. Since even the Respondent admits to some uncertainty as to whether or not GERD is an affirmative defense (BOC 20), there is at least ambiguity on the issue. Such ambiguity must be resolved against the State.

It would actually be an improvement in Ohio law to allow the defendant to assume the unconstitutional burden of proving his innocence since, to date, even this has been denied him. In this respect, the following questions deserves consideration:

Could a reasonable person doubt the result of a test performed on someone who is taking GERD medication where the testing machine has trouble testing people with GERD? If the answer to this question is yes, then evidence which raises a reasonable doubt is being barred. This is unconstitutional under *Holmes v. South Carolina* (May 01, 2006), __- S.Ct. __-, 126 S.Ct. 1727, 164 L.Ed.2d 503. The facts set forth in this question were offered, barred, and proffered.

If this were a civil case where the petitioner was required to establish his case by a preponderance, barring evidence which did not rise to a certain level of likelihood might make some sense. In a criminal case, the defendant does not have to prove that his theory is likely, he does not have to prove that it is true. All he need do is create one reasonable doubt about its veracity. If his evidence does this, the constitution gives him the right to present it.

GERD is one possible reason for the defendant's test result just as alcohol is one of many possible reasons for bloodshot eyes. Allowing the former is no more speculative than allowing the latter.

The trial court's statement cited on paged 21 of Respondent's brief that: "There's a lot of people out there using Zantac... that don't have acid reflux..." is a classic example of the *Holmes* problem of the trial court substituting its personal beliefs for the evidence. The proffer, which must be accepted as true, provides that:

"Zantac is not a drug of abuse and there is normally no other reason to take such medication other than to treat GERD." PWC 30a. The banned evidence was not speculative. It merely conflicted with the court's preexisting beliefs and thus seemed weak for this reason. This was an issue for the trier of fact.

2a. The *Holmes* argument was not waived.

It is hard to understand how the Petitioner is supposed to have waived his *Holmes* claim. Petitioner asserts that he was barred from presenting exculpatory evidence. The evidence in question was offered, barred, and proffered. While *Holmes* itself was not cited below, it had not been decided until the case reached the Ohio Supreme Court. There was no waiver.

b. The *Crawford* argument was not waived.

Respondent is mistaken in its claim that Petitioner waived *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 errors by not raising them in the trial court. Respondent's appellate counsel did not try the case and thus would not have remembered than when the documentary exhibits, which included the test result, were sought to be introduced, counsel for the Petitioner objected and made the following record:

> The United States Supreme Court recently decided Crawford versus Washington dealing with documentary evidence in criminal cases, and they said documentary evidence deprives the defendant of the right to cross-examination and that sort of thing. So we would list as an additional ground Crawford versus Washington. I actually do have the citation on that, I suppose I

should read into the record as well. That is -- It's a new case so there isn't a permanent one, but it's 72 United States Law Week 4229, and it was decided March 8, 2004. And the United States Supreme Court, I have not seen -- oh, it's 124 Supreme Court 1354. There is a Supreme Court cite on that too.

Trial transcript p. 398, l. 21-p. 399, l. 11. PWC 39a.

3a. Respondent apparently concedes that defendant's conviction was supported only by a preponderance of the evidence rather than proof beyond a reasonable doubt.

Respondent is silent as to how the mere test result which was found admissible by only a preponderance of the evidence can rise to the level of proof beyond a reasonable doubt without further proof. Nor does it explain how evidence which was never heard by the jury can be the sole proof of an element of the offense. Presumably Ohio concedes this point. Either defect is a serious constitutional violation and a sufficient reason for reversal.

CONCLUSION

WHEREFORE, petitioner asks that his petition be granted.

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